Supreme Court, U.S.
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In The

Supreme Court of the United States

CHARLES VOYED HARRELSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the court of appeals' denial of petitioner's application for a certificate of appealability conflicts with this Court's decisions in *Miller-El v. Cockrell*, 537 U.S. 322 (2003), *Wiggins v. Smith*, 123 S. Ct. 2527 (2003), *Williams v. Taylor*, 529 U.S. 362 (2000), and *Bracy v. Gramley*, 520 U.S. 899 (1997), with respect to the following issues:

1. Whether petitioner's trial counsel rendered ineffective assistance of counsel by failing adequately to investigate allegations that persons other than petitioner conspired to murder the victim.

2. Whether petitioner's trial counsel rendered ineffective assistance by failing adequately to investigate and challenge the prosecution's firearms evidence, and whether the district court erred in the § 2255 proceeding by refusing to permit discovery of the firearms issue.

3. Whether petitioner's trial counsel rendered ineffective assistance by failing adequately to investigate and challenge the prosecution's introduction of hypnotically induced eyewitness testimony, and whether the district court erred in the § 2255 proceeding by refusing to permit discovery on the hypnotically induced testimony issue.

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PETITION FOR A WRIT OF CERTIORARI

Charles Voyed Harrelson petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals denying Harrelson's application for a certificate of appealability ("COA") (App. 1-2) is unreported. The order of the district court (App. 3-4) denying Harrelson's application for a COA is unreported. The order of the district court denying Harrelson's motion under 28 U.S.C. § 2255 (App. 6-46) is unreported. The opinion of the court of appeals affirming Harrelson's conviction on direct appeal is reported at 754 F.2d 1153.

JURISDICTION

The court of appeals entered its order affirming the denial of Harrelson's application for a COA on December 2, 2003. App. 1. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. VI provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Section 2253(c) of Title 28, United States Code, provides in relevant part:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

. . . .

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

INTRODUCTION

This case arises from the 1979 murder of United States District Judge John H. Wood, Jr. In his opening statement, Harrelson's trial counsel, Thomas G. Sharpe, Jr., proclaimed: "We believe when we conclude this trial we will be able to prove, consistent with FBI records and evidence, who killed Judge Wood, and it will not be Charles Harrelson." T. 6/26/00 at 68, 72-73.[1] Sharpe broke this promise to the jury. He did not prove "who killed Judge Wood." But had Sharpe conducted even a rudimentary investigation, he would have discovered powerful evidence that implicated persons other than Harrelson in the murder, including attorney Alan Brown, whom Sharpe purported to use as an investigator on Harrelson's behalf. And had Sharpe presented this evidence to the jury, together with Harrelson's alibi defense, at least one juror

[1] The § 2255 hearing transcripts will be cited by date and page. Hearing exhibits that Harrelson introduced will be cited as "HX," and hearing exhibits that the government introduced will be cited as "GX." Trial transcripts will be cited by volume number and page.

surely would have had a reasonable doubt of Harrelson's guilt.

Harrelson is serving a life sentence because his trial attorney failed to take the most basic steps necessary to fulfill his promise to the jury to "prove . . . who killed Judge wood." Squarely contrary to this Court's recent decisions addressing the Sixth Amendment right to effective assistance of counsel in the context of an attorney's failure to investigate, the district court denied Harrelson's motion under 28 U.S.C. § 2255 without even permitting discovery on significant aspects of his claim. And the district court and court of appeals denied Harrelson's application for a COA, misapplying the standard this Court has established for such applications. The Court should grant certiorari and, on the merits, issue the COA and remand to the court of appeals for full briefing and decision.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE TRIAL COURT.

Judge Wood was murdered on May 29, 1979. T. 2/12/99 at 13; T. 2/1/00 at 3, 168. A grand jury in the Western District of Texas indicted Harrelson on April 15, 1982, and it returned a superseding indictment on April 20, 1982.

On May 1, 1982, Judge William S. Sessions appointed Sharpe as Harrelson's counsel. T. 6/26/00 at 9, 14, 169. On May 11, Sharpe wrote to Judge Sessions and asked to have Alan Brown – a San Antonio attorney – appointed as investigator T. 6/26/00 at 10; HX10. Sharpe's letter stated in part, "It's my opinion that this [the appointment of an investigator] is necessary in order for me to effectively

represent Charles Harrelson." *Id.* On June 8, 1982, Judge Sessions' clerk wrote back telling Sharpe to file a motion. T. 6/26/00 at 17 (Sharpe); HX11. Sharpe never did so. Brown was never appointed as investigator. T. 6/26/00 at 36. He did not investigate anything on Harrelson's behalf. T. 6/26/00 at 83-84, 90, 154, 156; T. 6/27/00 at 463.[2]

Harrelson's trial began in the John H. Wood, Jr. Memorial Courthouse in San Antonio on September 28, 1982. In his opening statement, Sharpe declared: "We believe when we conclude this trial we will be able to prove, consistent with FBI records and evidence, who killed Judge Wood, and it will not be Charles Harrelson." T. 6/26/00 at 68; *id.* at 72-73. The government contended that in early May 1979, Harrelson and Jimmy Chagra – a drug dealer and gambler – had a brief conversation in Las Vegas, during which Chagra hired Harrelson to kill Judge Wood. According to the government, Harrelson returned to Texas, followed Judge Wood to Midland in an effort to kill him there, and then assassinated the judge outside his townhouse in San Antonio on the morning of May 29.

Harrelson denied killing Judge Wood and presented an alibi defense. He contended that he was in Dallas when Judge Wood was murdered, and he called a series of witnesses (as well as offering his own testimony) to establish that he could not have carried out the killing. In response, the government attempted to show that the witnesses – including, for example, a bank teller from

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[2] In an apparent effort to convince Harrelson that Brown had worked on Harrelson's case, Sharpe wrote to Harrelson on April 9, 1984 listing Brown as an investigator. HX12. In fact, Brown had done nothing on the two projects for which Sharpe listed him. T. 6/26/00 at 22-25.

whom Harrelson purchased a cashier's check on the morning of May 29 and a doorman who parked his car that morning – were mistaken or lying.

Recognizing that Harrelson was in Dallas at some point on the morning of May 29, the government surmised that he either took a Southwest Airlines flight that left San Antonio around 9:25 a.m. and arrived in Dallas an hour later or drove a gold Cutlass similar to a vehicle that a hypnotized witness claimed to have seen near Judge Wood's townhouse. Both theories had problems. If Harrelson had flown, some record or witness likely would have existed documenting that fact. Moreover, if Harrelson had flown, he would have left the gold Cutlass behind in San Antonio. (It was undisputed at trial that the car had been there on May 28.) But the evidence showed that the car was in Dallas – and not in San Antonio – on May 29. If Harrelson had driven, on the other hand, he would not have had enough time to kill Judge Wood at 8:30 a.m., drive in excess of 200 miles, and be seen in Dallas no later than mid-morning.

Trial concluded on December 14, 1982. Contrary to his promise in opening statement, Sharpe did not "prove . . . who killed Judge Wood." The jury found Harrelson guilty of the charged offenses. The court of appeals affirmed Harrelson's conviction, *United States v. Harrelson*, 754 F.2d 1153 (5th Cir. 1985), and this Court denied Harrelson's petition for a writ of certiorari, 474 U.S. 1034 (1985).

II. THE RIOJAS ALLEGATIONS.

Sharpe had available – but did not investigate – powerful evidence, from Robert F. Riojas, Jr., implicating persons other than Harrelson in the murder of Judge Wood.

On May 29, 1979, Riojas and his counsel, Assistant Federal Public Defender (now United States District Judge) Edward Prado, were meeting concerning *United States v. McRae*, in which Riojas – a defendant – was trying to work out a resolution with the government. Prado called his office and learned that Judge Wood had been murdered. When Prado resumed his meeting Riojas stated abruptly, "I know who did it." T. 2/1/00 at 11-12, 87; HX46 at 1.

Riojas (through Prado) continued his efforts to resolve the charges against him in *McRae* with the DOJ Civil Rights Division and FBI agents working with the DOJ attorneys, emphasizing his knowledge of an assault on AUSA James Kerr in November 1978 and the Wood murder. On July 23, 1979, for example, the FBI interviewed Riojas, who provided information about a meeting with Sonny DeLaFuente, Larry Culbreath, and Warren Routon – all of whom had significant criminal records – relating to the assault on Kerr and the murder of Judge Wood. HX2; HX61 at 5-6. On August 9 and 10, 1979, Riojas provided photographs to the FBI that tended to corroborate the information that he had provided. HX2. The FBI did not disclose this information at the time to United States Attorney Jamie Boyd, who was leading the grand jury investigation in San Antonio. T. 2/1/00 at 30. On October 22, 1979, Riojas signed a plea agreement in the pending civil rights case.

On November 5, 1979, Bob Garcia, a probation officer in the Western District of Texas, contacted Jack Compton, an agent of the United States Customs Service, about the Riojas information. Compton notified United States Attorney Boyd. T. 2/12/99 at 14, 16; HX17. On November 7, 1979, Boyd traveled to El Paso, where Riojas was held,

and on November 8 he and Compton interviewed Riojas in the company of United States Marshal Tom Drager, who was responsible for Riojas' safety during his cooperation with the government. T. 2/12/99 at 17, 22-26; HX18. Riojas identified DeLaFuente, Culbreath, Routon, and attorney Alan Brown as persons involved in the Kerr assault and the Wood murder, and he furnished the group photograph (earlier provided to the FBI). T. 2/12/99 at 30; NX19, 26.

Over the following weeks, Boyd and Compton investigated Riojas' allegations and discovered additional evidence that tended to corroborate his information. HX19. On November 28, 1979, Boyd and Compton met with Riojas and his new counsel, Assistant Federal Public Defender Larry Mathews. Riojas presented certain demands for the government to satisfy before he would provide additional information. T. 2/12/99 at 54-56, 63-68, 75-76; HX2, 23, 27, 28.

On December 4, 1979, Boyd, Compton, and Mathews met in Washington with Philip Heymann (Assistant Attorney General for the Criminal Division of the department of Justice) and other DOJ officials, including Acting deputy Attorney General Charles Ruff. Boyd, Compton, and Mathews expressed confidence in the Riojas information. Ruff and Heymann refused to meet Riojas' demands but told Mathews that they wanted to remain in contact. T. 2/12/99 at 77-100; T. 2/1/00 at 108-13; HX24, 29.

Following the December 4 meeting negotiations with Riojas remained stalemated for several months. *E.g.*, T. 2/12/99 at 117-18, 121-23, 127-28, 136; HX32, 38, 39, 40, 41, 42, 44, 46. On February 21, 1980, another meeting was held in Washington among Heymann, Boyd, and participants in the Riojas negotiations. T. 2/12/99 at 137-38. On February 29, 1980, Mathews wrote to Heymann, enclosing

a proffer from Riojas that included substantial detail but omitted the names of many key participants. T. 2/12/99 at 138-40; HX47. As a result of this proffer and protections that the government agreed to provide, HX48-51, Riojas ultimately gave an extensive interview to the government over several days in June 1980.

During the June interview, Riojas detailed the information that he possessed concerning the Kerr assault and the Wood murder. Riojas told the FBI about a series of meetings involving, among others, attorney Brown, Riojas' former counsel; several of Brown's other clients, including Culbreath, DeLaFuente, and Barry Beck; and other associates of Brown, including Routon and Las Vegas gambler Jack Strauss. According to Riojas, during the meetings and conversations, those present – including Brown – planned the assault on Kerr and the murder of Judge Wood and encouraged Riojas to participate. HX3, 4, 5, 18; T. 2/12/99 at 26, 162; T. 2/1/00 at 170-71. Riojas never named Harrelson as involved in the Wood murder. T. 2/1/00 at 16.

Boyd's investigation produced circumstantial evidence that corroborated important aspects of the Riojas information. T. 2/1/00 at 13; *see* T. 2/12/99 at 39-41. The corroboration included the following elements:

> – Riojas described a November 8, 1978 birthday party involving Riojas, Routon, and Culbreath, at which Riojas "had close conversations with Routon about how to obtain weapons to assassinate someone important and that he had these there at the house." T. 2/1/00 at 22, 84; T. 2/12/99 at 41-42. Riojas furnished a photograph of the party. T. 2/12/99 at 30-31; T. 2/1/00 at 13; HX19 at 1-2, 26. Riojas' sister confirmed that during

the party, Riojas "had a deep conversation alone with ROUTON for quite some time." HX19 at 3.

– Riojas described a lunch at the St. Anthony Hotel in San Antonio with Brown and Culbreath. HX61 at 13, 20. Brown acknowledged that the lunch had occurred, although he disputed its purpose. T. 3/29/01 at 122-23.

– Riojas stated that he wanted to visit Jesse Onofre, Sr., at Leavenworth Prison before agreeing to become involved in Brown's plot. HX61 at 25. Visitation records from the prison confirmed that Riojas visited Onofre. T. 3/29/01 at 123-24; HX61 at 109-14.

– Riojas told investigators that "Larry Culbreath and Warren Routon had scoped out Judge Wood at the courthouse and someplace where Judge Wood went fishing." HX61 at 22; *see* T. 3/29/01 at 128-29. Boyd and Compton, with the Austin Police Department, confirmed that Strauss and Culbreath had been in Rockport, Texas at a time when Judge Wood was in residence there and that they departed their room at the Seagun Motel rapidly leaving valuables behind. T. 2/12/99 at 46-47; HX20 at 2-3; T. 2/1/00 at 15, 96-98.

– Riojas stated that DeLaFuente was to receive $50,000 from an individual in Las Vegas for his part in the plot. HX61 at 14. Boyd's investigation confirmed that on May 25, 1979, four days before Judge Wood's killing, Strauss had given DeLaFuente $50,000 to sponsor him in a restaurant enterprise in Las Vegas. T. 2/12/99 at 48-51, 157; HX20 at 3; T. 2/1/00 at 15, 94-95; T. 3/29/01 at 128. DeLaFuente was later abducted and disappeared. T. 2/1/00 at 15.

– Telephone tolls showed a number of calls during the period preceding Judge Woods' murder

among Strauss, Culbreath, and DeLaFuente. T. 2/1/00 at 16, 90-91, 118-19; Hx34 at 1-2.

– Telephone tolls showed a flurry of calls among Brown, Beck, Culbreath, DeLaFuente, and Routon on may 29, 1979 following Judge Wood's murder. HX2 at 5; T. 3/29/01 at 129.

– Riojas stated that "Larry Culbreath was to destroy the weapons used in the killings at the Shamrock Auto Salvage located off S.W. Military Drive." HX61 at 21; *see id.* at 15. On the day of Judge Wood's murder, there was a call from Routon at Shamrock Wrecking to Culbreath in Pleasonton. T. 2/1/00 at 17, 119.

– Riojas stated that he had a shotgun that he had received from DeLaFuente in connection with the Kerr assault. HX61 at 15-16, 18, 24. Riojas produced a shotgun, which was traced back to DeLaFuente. T. 3/29/01 at 124; HX61 at 103, 107.

– Riojas stated that he had a handgun that he had received from Brown. HX61 at 18. He produced the handgun, and it was traced back to Brown. T. 3/29/01 at 124-25; HX61 at 103, 105, 108.

–Riojas stated that Culbreath attended Riojas' state court trials and complimented him for being a "standup guy." HX61 at 17. When the FBI Spoke with Culbreath, he confirmed that he had attended. T. 3/29/01 at 127.

Nothing that Riojas told Boyd, Compton, and Drager was disproven to their knowledge. Boyd testified: "I never found anything that he said to be untrue." T. 2/12/99 at 157. Both he and Attorney General Benjamin Civiletti believed that Riojas possessed useful information about the Wood case. T. 2/12/99 at 124-26; HX43. Similarly, Compton "never did find [Riojas] to be lying." T. 2/1/00 at

100, 119-20. And Drager "know[s] of no time that we could ever say that Mr. Riojas wasn't straightforward and provided factual information." T. 2/1/00 at 171; *see id.* at 174.

Other circumstances as well tended to confirm Riojas' veracity. For example, as Boyd noted, the Department of Justice had "given [Riojas] the benefits of the witness protection program, which is substantial," and it had "fronted him as a witness [in the *McRae* case] and vouched for his credibility in district court." T. 2/1/00 at 27; *see id.* at 51-52. One of the *McRae* prosecutors acknowledged that Riojas testified truthfully as a government witness in that case. T. 2/20/02 at 97. In addition, Riojas sought no benefit from his information concerning the Wood murder unless there was an indictment and a conviction. T. 2/12/99 at 91-92; T. 2/1/00 at 115-17; HX29 at 2; HX46 at 2. And Judge Sessions reduced Riojas' sentence on the *McRae* case from 25 years to 12 years because of his cooperation with the government, after an ample opportunity to evaluate Riojas' credibility. T. 2/20/02 at 98-102; HX80 at 38; HX81.

In late August 1982, four months after indictment and three to five weeks before trial, Sharpe learned from reading the Riojas interview memoranda that attorney Brown – Sharpe's purported investigator – had been a suspect in the Wood murder. T. 6/26/00 at 15-16, 33-36, 38. Sharpe conducted almost no investigation of the Riojas allegations. He did not talk to Riojas. T. 6/26/00 at 39, 41. He did not talk with DeLaFuente or Routon. T. 6/26/00 at 43. He did not talk with Compton or Drager. T. 8/3/98 at 202-03. He did not talk with Boyd about the Riojas allegations. T. 6/26/00 at 63-65; T. 2/12/99 at 172. Sharpe claimed to have talked with Brown about the allegations, T. 6/26/00 at 40, 49, 62, but the "discussion" consisted in

its entirety of some comment by Sharpe like, "It was unbelievable what Riojas had said." T. 6/26/00 at 135; *see* T. 8/4/98 at 427. Sharpe claimed that he had arranged through Brown to speak with Brown's clients Culbreath and Beck, T. 6/26/00 at 24-25, but Brown had no recollection of such a meeting, T. 6/26/00 at 136-37. Finally, Sharpe claimed that he spoke with FBI agent Joe Gannon about the Riojas allegations – hardly an objective source, given the history set out above – but he conceded that, as to Brown, the agent referred him to Boyd, with whom he did not speak. T. 6/26/00 at 65-67. And even as to the other Riojas suspects, Gannon "didn't tell [Sharpe] anything he did other than that he had taken the information, the FBI had run with it, and that sometime apparently four or five months after the last Riojas statement was made, the Riojas allegations were discounted and closed." T. 8/3/98 at 157.[3]

III. HARRELSON'S MOTION UNDER 28 U.S.C. § 2255.

On April 23, 1997, Harrelson filed his motion to vacate the conviction under 28 U.S.C. § 2255 and requested an evidentiary hearing. R.468, at 1; Supp. R.470, at 1. Harrelson presented a number of claims, including

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[3] Sharpe's inadequate investigation was likely caused in part by the gross mismatch in resources between the prosecution and the defense. By the time of the indictment in April 1982, the government had already spent nearly $5,000,000 investigating the case. By the end of trial and after appeal, the total cost to the government was more than $11,000,000. Four prosecutors and three FBI agents worked full-time on the case during trial. By contrast, Sharpe – working with neither co-counsel nor an investigator – incurred fees and expenses for his representation of Harrelson of roughly $7000. T. 6/26/00 at 249.

the claim that Sharpe had rendered ineffective assistance of counsel in critical respects. Supp. R.470, at 2-4. Harrelson moved under Rule 6 of the Rules Governing Section 2255 Proceedings for leave to conduct discovery on his claims. R.493, at 139; R.533, at 298; R.613, at 679; R.644, at 759 n.1, 784-85.

The district court denied Harrelson's request for an evidentiary hearing and discovery on all claims except issues related to the claim that Brown had a conflict of interest. R.515, at 253; R.517, at 255; R.565, at 467-69, 471; R.617, at 711; R.649, at 864-65. The court ultimately framed three issues for discovery and an evidentiary hearing: "The exact nature and scope of Alan Brown's representation of movant, if any, in connection with this case"; "the extent to which movant was advised of Mr. Brown's actual role in representing movant and/or of the fact Mr. brown had been mentioned as a potential witness or suspect in the underlying criminal case"; and the "validity of the Riojas allegations." R.515, at 253; R.517, at 255; R.565, at 463, 470-71.

The district court conducted evidentiary hearings on August 3-5, 1998, June 26-29, 2000, and on several other days directed to the issues set out above. Among the witnesses were Sharpe, Brown, and Harrelson; former United States Attorney and United States Magistrate Boyd; former United States Marshal Drager; former United States Customs agent Compton; various FBI agents associated with the Wood investigation and prosecution; and polygraph experts, who addressed the validity of polygraph examinations that the FBI gave to Brown and other persons whom Riojas named as potentially involved in a conspiracy to murder Judge Wood.

On March 14, 2003, the district court denied Harrelson's motion under 28 U.S.C. § 2255. App. 6. The court rejected Harrelson's claims without specifically addressing any of the evidence that he had offered, including the testimony – discussed above – of former federal officials Boyd, Drager, and Compton.

Harrelson filed his notice of appeal and applied to the district court for a COA. R.651, at 868; R.654, at 874. On June 13, 2003, the court denied the application App. 3. Harrelson then applied to the United States Court of appeals for the Fifth Circuit for a COA. The court denied the application without analysis in a two-page order on December 2, 2003. App. 1.

REASONS FOR GRANTING THE WRIT

The Court should grant the writ because the decision of the court of appeals denying Harrelson's application for a COA misapplies the standard set forth in 28 U.S.C. § 2253 and *Miller-El*. In addition, the decisions of the courts below conflict with this Court's decisions interpreting the "Assistance of Counsel" clause of the Sixth Amendment and establishing the scope of discovery in a § 2255 proceeding. At a minimum, Harrelson's substantial constitutional and procedural claims warrant a full appeal on the merits.

I. THE COURT OF APPEALS MISAPPLIED THE STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY.

An unsuccessful movant under 28 U.S.C. § 2255 must obtain a COA before he can pursue the merits of an appeal. 28 U.S.C. § 2253(c)(1). A prisoner seeking a COA

"need only demonstrate 'a substantial showing of the denial of a constitutional right.'" *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003) (quoting 28 U.S.C. § 2253(c)(2)). To satisfy this standard, the movant "must 'show that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.'" *Id.* at 336 (quoting *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation omitted)).

This Court has emphasized that "a COA does not require a showing that the appeal will succeed," and a court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Id.* at 337. Section 2253, as construed by this Court, "do[es] not require petitioner to prove, before issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id.* at 338.

Although § 2253 refers to "denial of a constitutional right," petitioners may also appeal the district court's procedural rulings. A COA should issue for review of a procedural ruling "when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack*, 529 U.S. at 484.

In light of these principles, Harrelson at least should have received a COA on the issues discussed below. The

lower courts' refusal to grant the COA conflicts with *Miller-El*, with the standards governing ineffective assistance "failure to investigate" claims, as set forth in *Wiggins* and *Williams*, and with the standards governing the right to discovery in a § 2255 proceeding as set forth in *Bracy*.

II. HARRELSON HAS MADE A "SUBSTANTIAL SHOWING" THAT HIS COUNSEL RENDERED INEFFECTIVE ASSISTANCE UNDER THE *STRICKLAND* STANDARD.

A. The *Strickland* Test.

The Sixth Amendment guarantees a criminal defendant "the Assistance of Counsel for his defense." U.S. Const. Amend. VI. In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court established a two-part test a defendant must meet to establish ineffective assistance of counsel. *First*, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. To meet the "reasonableness" standard, counsel must "make reasonable investigations or . . . make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691; *see, e.g., Wiggins v. Smith*, 123 S. Ct. 2527, 2535-36 (2003) (finding counsel ineffective for failure to investigate adequately); *Williams v. Taylor*, 529 U.S. 362, 393-98 (2000) (same); *Lockett v. Anderson*, 230 F.3d 695, 711-17 (5th Cir. 2000) (same). "[A]t a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case." *Nealy v. Cabana*, 764 F.2d 1173, 1177 (5th Cir. 1985); *see, e.g., Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979) (per curiam). Significantly, "*Strickland* does not require [the court] to

defer to decisions that are uninformed by an adequate investigation into the controlling facts and law." *Lockett*, 230 F.3d at 714 (quotation omitted); *see, e.g.*, *Wiggins*, 123 S. Ct. at 2538 ("*Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather, a reviewing court must consider the reasonableness of the investigation said to support that strategy."); *Bouchillon v. Collins*, 907 F.2d 589, 597 (5th Cir. 1990) ("Tactical decisions must be made in the context of a reasonable amount of investigation, not in a vacuum.").

Second, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Strickland*, 466 U.S. at 692. To satisfy this requirement, the defendant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. Rather, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see, e.g.*, *Wiggins*, 123 S. Ct. at 2542-44. A defendant who alleges a failure to investigate must show "what the investigation would have revealed and how it would have altered the outcome of the trial." *Lockett*, 230 F.3d at 713 (quotation omitted).

B. Harrelson Has Made a "Substantial Showing" That His Counsel Failed Adequately to Investigate the Riojas Allegations.

Applying these standards Harrelson has made a "substantial showing" that Sharpe was ineffective for

failing to investigate and use the Riojas allegations. The court of appeals' contrary conclusion conflicts with *Miller-El, Wiggins*, and *Williams*.

1. Sharpe's Inadequate Performance.

As detailed above Sharpe conducted no significant investigation of the Riojas allegations. He did not talk with Riojas, Boyd, Compton, or Drager about those allegations – the people with the most knowledge of them. His entire "investigation" consisted of one comment to Brown, an alleged conversation with FBI agent Joe Gannon, and alleged conversations with Larry Culbreath and Barry Beck – two suspects who obviously would deny participation in the killing. And the alleged conversation with Culbreath occurred *before* Sharpe even learned of the Riojas allegations from the interview memoranda that the government produced a few weeks before trial. This hardly amounts to the "independent examination" of the facts that the Sixth Amendment, as interpreted by this Court, requires.

Nor was it reasonable for Sharpe *not* to investigate the Riojas claims. In a murder case where the defendant asserts an alibi defense, it is hard to imagine that it would *ever* be reasonable not to investigate a specific allegation, not implausible on its face, that someone else committed the crime. But it is patently unreasonable for defense counsel not to conduct such an investigation when he intends (as Sharpe did) to promise the jury in his opening statement that he will identify the true killer. To not investigate the most promising information available and then to make such a promise amounts to gross incompetence. *See, e.g., Wiggins*, 123 S. Ct. at 2538 (ineffective assistance where counsel told sentencing jury that it

would "hear that [the defendant] has had a difficult life," but did not do investigation necessary to present supporting evidence).

2. Prejudice from Sharpe's Inadequate Performance.

Sharpe's inadequate performance prejudiced Harrelson. If Sharpe had investigated the Riojas allegations in a reasonable manner, he would have discovered the extensive corroboration set out above. And if Sharpe had backed up his promise to the jury to identify the actual killer of Judge Wood by presenting the Riojas evidence, supported with the corroborating information that Boyd and Compton had obtained, there is *at least* a "reasonable probability" – that is, "a probability sufficient to undermine confidence in the outcome" – that "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.

To avoid conviction, Sharpe needed only to convince *one juror* that a reasonable doubt existed as to Harrelson's guilt. *Cf. Lockett*, 230 F.3d at 716 (noting that death sentence in Mississippi requires unanimity and declaring: "If we can conclude that *a juror* could reasonably have concluded that the death penalty was not an appropriate penalty in this case based on the mitigating evidence, prejudice will have been established." (emphasis added)). There is at least a reasonable probability that Sharpe would have raised a reasonable doubt in one juror's mind had he investigated and presented the Riojas evidence. *See, e.g., id.* at 715-17 (finding prejudice at penalty phase of capital case from counsel's failure to investigate mental health evidence); *Nealy*, 764 F.2d at 1178-80 (finding

prejudice from counsel's failure to investigate alibi defense).

C. Harrelson Has Made a "Substantial Showing" That His Counsel Rendered Ineffective Assistance with Respect to the Firearms Evidence.

The government presented evidence at trial that JoAnn Harrelson – petitioner's then-wife – had purchased a .240 Weatherby Mark V rifle twelve days before Judge Wood's murder. Although the rifle was never found, the government sought to prove through the testimony of FBI agent Robert Sibert, from the Firearms Identification Unit of the FBI Laboratory, that the bullet which killed Judge Wood came form the same kind of rifle Ms. Harrelson had purchased. Sharpe rendered ineffective assistance by failing adequately to investigate and counter Sibert's testimony, and the district court erred in denying Harrelson discovery on this issue.

1. Sharpe Rendered Ineffective Assistance of Counsel with Respect to the Firearms Evidence.

Sibert's analysis ran as follows. He testified that the bullet that killed Judge Wood had a diameter of .243 inches, or 6 mm. XX T. 27. The bullet had land and groove impressions of .040 inches and .086 inches, respectively. XX T. 30. Various .243 caliber rifles, including the Weatherby Mark V, produce the same land and groove impressions as those found on the fatal bullet. XX T. 23, 36, 68. But the bullet that killed Judge Wood, according to Sibert, was manufactured by Hornady. And of the rifle manufacturers that make weapons which produce the same land

and groove impressions as found on the bullet that killed Judge Wood, only Weatherby uses the Hornady .243 caliber bullet. XX T. 37-40, 76-77. Thus, Sibert's testimony strongly suggested that the bullet which killed Judge Wood had been fired from a Weatherby rifle of the type that Jo Ann Harrelson had purchased shortly before Judge Wood's death.

If Sharpe had conducted a reasonably competent investigation, he would have discovered critical flaws in Sibert's testimony and exculpatory evidence that he could have offered on Harrelson's behalf. For example: (1) as Harrelson's expert, Dr. John Thornton, stated in his declaration, there is no evidence or documentation supporting Sibert's opinion that Hornady manufactured the lethal bullet, Thornton Dec. ¶ 11; (2) contrary to Sibert's testimony, the .243 caliber Hornady bullet is attached to many different types of cartridges and sold by Hornady as ammunition for a large number of .243 caliber rifles, Thornton Dec. ¶ 10; (3) there are more than twenty different firearms capable of firing a 6 mm cartridge with a Hornady bullet – not merely five, as Sibert testified (XX T. 65-68), Thornton Dec. ¶ 7(D), (E); and (4) the inside barrel diameter of the Weatherby – unlike the other three rifles that Sibert mentioned – is .2435, rather than .243. When a .243 caliber bullet is fired through a Weatherby rifle, it expands to .2435 inches. Thus, if the bullet that killed Judge Wood had been fired from a Weatherby rifle, it would have had a diameter of .2435. Second Declaration of David Michael, Supp. R.470, at 89-90.

Sharpe rendered ineffective assistance of counsel with respect to the firearms evidence. In particular, Sharpe (1) failed to consult with and present a defense firearms expert; (2) failed to have a defense expert examine the

fragment of the bullet that killed Judge Wood; (3) failed to obtain or review Sibert's bench notes, which would reflect the details of his examination and analysis; and (4) largely as a result of these omissions, failed to present the exculpatory evidence set out above. As Dr. Thornton observes,

> [T]he cross-examination of Mr. Sibert . . . was so poorly crafted as to ignore issues that could have provided significant benefit to Mr. Harrelson. The failure to develop the forensic issues was, in my opinion, prejudicial to Mr. Harrelson in that it failed to properly characterize the evidence related to the firearms testimony.

Thornton Dec. ¶ 6.

In the respects set forth above, Sharpe's representation "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. And "there is a reasonable probability that, but for [Sharpe's] unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Sibert's testimony linking the gun JoAnn Harrelson purchased to the bullet that killed Judge Wood was critical to the government's case and damaging to Harrelson. Without that testimony, there is a reasonable probability – a probability "sufficient to undermine confidence in the outcome" – that the jury would have accepted Harrelson's alibi defense. *Id.*

2. Harrelson Has Made a "Substantial Showing" That the District Court Erred in Denying Him Discovery.

Harrelson repeatedly requested discovery concerning the firearms issue. In particular, he sought disclosure of Sibert's bench notes and associated documents and the bullet fragments. *See, e.g.*, R.493, at 147-49, 154; R.504, at 226; R.533, at 304; R.613, at 679. The district court refused to

grant the requested discovery. R.565, at 467-69; R.617, at 711.

Harrelson has made a "substantial showing" that the court's ruling was error. A court must grant discovery on a § 2255 motion where "good cause" exists to do so. Rules Governing Section 2255 Proceedings, Rule 6. This Court has held that "good cause" exists for discovery "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-09 (1997) (quotation and ellipsis omitted). Harrelson cannot possibly "fully develop" his claim that Sharpe was ineffective with respect to the firearms evidence without discovery of Sibert's bench notes and production of the bullet fragments. *See, e.g.*, Thornton Dec. ¶ 5. The lower courts' refusal to permit discovery on the firearms issue conflicts with the standard this Court established in *Bracy*.

D. Harrelson Has Made a "Substantial Showing" That His Counsel Rendered Ineffective Assistance with Respect to the Hypnotically Induced Testimony.

Two witnesses – Chrys Lambros and Wesley Coddington – gave post-hypnotic testimony identifying Harrelson. I T.217; VIII T. 135. Sharpe did not move in limine to exclude this evidence as unreliable. The failure to make such a motion constitutes ineffective assistance of counsel The district court further erred in refusing to grant Harrelson's requests for discovery on this issue.

1. Sharpe Rendered Ineffective Assistance of Counsel with Respect to the Hypnosis Issue.

Coddington testified at trial that Harrelson was a passenger he had transported in his cab from San Antonio airport to the Chateaux Dijon townhouses the night before Judge Wood was killed. VIII T. 165. Lambros testified that she had encountered Harrelson at the townhouse complex on the morning when Judge Wood was killed. I T. 231. Neither Coddington nor Lambros had identified Harrelson *before* being hypnotized by the FBI. VIII T. 158-159; I T. 234-35, 242. Both witnesses were hypnotized by Dr. Richard Garver, an Air Force hypnotherapist, who worked with the FBI in various investigations. XXXV T. 101, 117, 139. Along with Dr. Garver and the hypnotic subject, there was also at least one FBI agent present at the hypnotic sessions. XXXV T. 107-108; FBI 302 Report, dated 1/21/81 (three FBI agents present for Coddington hypnosis).

Sharpe failed to move to exclude the testimony of Coddington and Lambros. *See Harrelson*, 754 F.2d at 1180 ("Charles Harrelson did not object at trial to the admission of the testimony of two witnesses, Chrys Lambros and Wesley Coddington, who had been hypnotized before trial."). Nor did Sharpe consult a defense expert, or obtain a defense expert witness, on the issue of hypnotically induced testimony. Instead, he called the *government* expert – Dr. Garver – in the defense case, and he played the videotapes of the Lambros and Coddington Hypnosis sessions for the jury. In all of these respects, Sharpe rendered ineffective assistance of counsel. *See* Declaration of Ephraim Margolin, ¶¶ 7, 8 ["Margolin Dec."]; Declaration of Robert a. Karlin, Ph.D., ¶ 6 ["Karlin Dec."].

At the time of Harrelson's trial, a growing number of cases and other authorities had rejected the use of eyewitness testimony about details the witness "remembered" only after hypnosis. *See, e.g., State ex rel. Collins v. Superior Court*, 644 P.2d 1266, 1295-97 (Ariz. 1982); *People v. Shirley*, 723 P.2d 1354, 1384-85 (Cal. 1982); *Collins v. State*, 447 A.2d 1272, 1283 (Md. Spec. App. 1982), *aff'd*, 464 A.2d 1028 (Md. 1983); *State v. Mack*, 292 N.W.2d 764, 766-71 (Minn. 1980); *Commonwealth v. Nazarovitch*, 436 A.2d 170, 177-78 (Pa. 1981); Orne, *The Use and Misuse of Hypnosis in Court*, 27 Int'l J. Clinical & Experimental Hypnosis 311 (1979); Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness*, 68 Cal. L. Rev. 313, 335 (1980). In light of these authorities, any reasonably competent attorney would have moved to exclude the Coddington and Lambros testimony. Margolin Dec. ¶¶ 7, 8; Karlin Dec. ¶ 6.

Of particular significance, seven months before Harrelson's trial, the California Supreme Court decided *Shirley*, which held that all posthypnotic testimony is per se inadmissible. *Shirley* was of great interest to the scientific community. The decision was discussed at length in seminars on hypnosis across the nation and was well known among the scientific experts in the field. *See* Karlin Dec. ¶ 6(a). The decision reflected the consensus of informed expert opinion, which rejected the use of hypnosis for the courtroom because it is not scientifically reliable or accurate. *Shirley*, 723 P.2d at 1366-67. If Sharpe had done reasonable pre-trial research on this issue, he would have found *Shirley*, and he would have discovered that the *Shirley* court joined the "growing number of courts that have abandoned any pretense of devising workable 'safeguards' and have simply held that hypnotically induced testimony is so widely viewed as unreliable" that it is

inadmissible under the "general acceptance" standard of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Shirley*, 723 P.2d at 1366.

As an alternative position, Sharpe should have moved for exclusion of the Coddington and Lambros testimony based on the absence of the procedural safeguards proposed by Dr. Martin Orne, a standard some courts adopted to protect against an impermissibly suggestive identification procedure. Three years before Harrelson's trial, Dr. Orne, a leading expert, proposed six safeguards that should exist before hypnotically induced testimony could be admitted: (1) the hypnotist must be a qualified psychiatrist or psychologist who has experience in the use of hypnosis; (2) the hypnotist should work independently, not as an agent for either party to the litigation; (3) all information given to the hypnotist before the hypnosis session must be recorded; (4) before hypnosis, the subject must describe the facts to the hypnotist as he then remembers them; (5) all contact between the hypnotist and the subject must be recorded, preferably on videotape; and (6) no person other than hypnotist and subject should be present during any contact between the two. Orne, *supra*, 27 Int'l J. Clinical & Experimental Hypnosis at 335-36. If he had done any research, Sharpe would have found that several courts had held that the proponent of hypnotically enhanced testimony must demonstrate that these safeguards were employed to ensure the reliability of the testimony, given its dangerous potential for abuse. *See, e.g., State v. Hurd*, 432 A.2d 86, 96-97 (N.J. 1981); *State v. Beachum*,

643 P.2d 246, 253-54 (N.M. App. 1981); *State v. Long*, 649 P.2d 845, 847 (Wash. App. 1982).[4]

The hypnotic sessions that produced the Coddington and Lambros testimony placing Harrelson at the scene of the crime violated at least two of the six Orne safeguards. The hypnotist, Dr. Garver, was not a neutral agent; he was employed by the government and served as a consultant to the FBI. XXXV T. 99-101. And others were present at the hypnotic sessions besides the hypnotist and subject, specifically FBI agents who were involved with the investigation of the killing of Judge Wood. XXXV T. 107; FBI 302 Report, dated 1/21/81; *see* Karlin Dec. ¶ 6(a). And the hypnosis of Coddington and Lambros may have violated additional safeguards. It cannot be determined on the existing record (1) who prepared the questions to be asked of the subjects: (2) whether a full recorded pre-hypnotic statement was made before hypnosis; (3) what information, if any, was given to the hypnotist before the hypnotic session was recorded; (4) what involvement the FBI agents had in the hypnotic sessions; and (5) what involvement the hypnotist had as an agent of the government. Sharpe appears to have never sought such information.

Apart from his failure to move to exclude the Coddington and Lambros testimony, Sharpe failed to consult his

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[4] In a case decided two years after Harrelson's trial, the Fifth Circuit held inadmissible "an uncorroborated personal identification, made only after hypnosis, of a person clearly singled out for suspicion," but left open the possibility that other post-hypnotic testimony could be admissible if "adequate procedural safeguards have been followed," and "[i]f a sufficiently reliable method exists for the witness to separate pre-hypnotic memory from post-hypnotic pseudomemory." *United States v. Valdez*, 722 F.2d 1196, 1203-04 (5th Cir. 1984).

own expert, despite the abundance of experts who could testify about the dangers of post-hypnotic eyewitness testimony. Instead, Sharpe relied on the testimony of the *government's* hypnotist, Dr. Garver, whose opinion was in direct conflict with other experts in the field. By calling the government hypnotist, rather than an expert from the scientific community, Sharpe failed to show the jury the strong objections that scientific and legal experts had been voicing regarding hypnosis in the courtroom. *See* Margolin Dec. ¶ 7 ("During this period of time, from 1977 to 1982 there were numerous expert witnesses available to testify about the serious dangers in admitting post-hypnotic testimony in judicial court proceedings. Any reasonably competent and knowledgeable criminal defense attorney would have known to consult such an expert if the issue of hypnotically induced recall existed in a case."); Karlin Dec. ¶ 6(b) ("The calling of the prosecution hypnotist as an expert by the defense is almost inconceivable."). And Sharpe compounded his other errors by playing the videotapes of the Coddington and Lambros hypnosis sessions for the jury. *See* Karlin Dec. ¶ 6(c). ("Videotaped presentations of the raw hypnotic interviews could only hurt the defense. . . . [T]he presentation to the jury of the raw hypnotic session is the last thing most defense attorneys would want. No expert I know would have thought it a reasonable strategy.").

There is a "reasonable probability that, but for" Sharpe's errors with respect to the Coddington and Lambros testimony, the result of the case would have been different. *Strickland*, 466 U.S. at 694. Lambros was the *only* person who placed Harrelson at the scene of the crime, and Coddington placed him both at the San Antonio airport *and* at the townhouse complex the night before the killing of Judge Wood. Given the defense witnesses who

saw Harrelson in Dallas throughout the day of the killing, the testimony of Lambros and Coddington was crucial to the government's case.

The government's closing underscored the importance to the prosecution of the posthypnotic testimony. *See, e.g.*, XLI T. 234 (Charles Harrelson was at the scene of the crime and Chrys Lambros ran "right smack dab into him"); XLI T. 233 (Harrelson in Coddington's cab); XLI T. 204-05 (Lambros placed Harrelson at the apartments and her description); XLI T. 211-13 (Lambros not lying in her testimony); XLI T. 251 (Lambros should be believed about seeing Harrelson at the apartment building). The testimony was especially significant because there was *no* physical evidence (such as fingerprints, footprints, or clothing) that placed Harrelson at the scene of the crime. If the Coddington and Lambros testimony had been precluded or discredited, the government would have had little evidence placing him at the scene of the killing, while the defense presented several unhypnotized witnesses placing him elsewhere that morning.

The district court, relying on the Fifth Circuit's decision on direct appeal, concluded that Harrelson cannot satisfy the prejudice prong of *Strickland* with respect to the hypnotically induced testimony. App. 43. But the Fifth Circuit addressed a different question: whether Harrelson (represented on appeal by Sharpe) had met his burden of showing that the Coddington and Lambros testimony "had a substantial impact on the jury's verdict." *Harrelson*, 754 F.2d at 1180-81. Because Sharpe "ignored this issue" and rested his argument "almost entirely o[n] massive quotes from" a Fifth Circuit case decided after Harrelson's trial, *id.* at 1180 & n.29, the court of appeals found that he had not shown the necessary impact. Sharpe's inept performance on

appeal – in particular, his complete failure to address the harmless error issue concerning Coddington and Lambros – cannot now preclude a finding that he was ineffective at trial as well.

2. Harrelson Has Made a "Substantial Showing" That the District Court Erred in Denying Him Discovery and an Evidentiary Hearing.

In the § 2255 proceeding, Harrelson repeatedly requested discovery concerning the hypnosis issue, including videotapes of the hypnosis sessions and related documents. *See, e.g.*, R.493, at 151, 154-55; R.504, at 226; R.533, at 304. The district court refused to grant the requested discovery. R.565, at 469. Harrelson has made a "substantial showing" that the district court's ruling was error; "good cause" plainly existed to order the requested discovery.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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February 2004

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-50587
USDC No. SA-97-CV-518
USDC No. SA-82-CR-57-ALL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES VOYDE HARRELSON,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

(Filed Dec. 2, 2003)

ORDER:

Charles Voyde Harrelson moves this court for a certificate of appealability (COA) to appeal the denial of his 28 U.S.C. § 2255 motion, in which he challenged his conviction of the murder of Judge John Wood. He raises the following arguments: (1) whether trial counsel was ineffective by failing to adequately investigate the allegations of Robert Riojas, Jr., that persons other than Harrelson murdered Judge Wood ("the Riojas allegations"); (2) whether Alan Brown served as counsel to Harrelson and, if so, rendered ineffective assistance at trial by failing to adequately investigate the Riojas allegations; (3) whether trial counsel rendered ineffective

assistance in failing to adequately investigate and challenge the prosecution's firearms evidence; (4) whether the district court abused its discretion in refusing to permit discovery or to conduct an evidentiary hearing on the firearms issue; (5) whether trial counsel rendered ineffective assistance in failing to adequately investigate and challenge the introduction of hypnotically induced eyewitness testimony; (6) whether the district court abused its discretion in refusing to permit discovery or to conduct an evidentiary hearing on the hypnotically induced testimony issue; (7) whether Brown had a conflict of interest arising from the Riojas allegations, which violated Harrelson's right to effective assistance of counsel; and (8) whether the Government violated *Brady*[1] by failing to disclose evidence that corroborated the Riojas allegations.

Harrelson, however, has not "demonstrat[ed] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *See Slack v. McDaniel,* 529 U.S. 473, 484 (2000). He is therefore not entitled to a COA, and his motion is DENIED.

/s/ Patrick E. Higginbotham
PATRICK E. HIGGINBOTHAM
UNITED STATES CIRCUIT
JUDGE

[1] *Brady v. Maryland*, 373 U.S. 83 (1963).

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CHARLES VOYED HARRELSON,	§	
	§	
Movant,	§	**CIVIL NO.**
v.	§	**SA-97-CA-518**
UNITED STATES OF AMERICA,	§	**[SA-82-CR-57(2)]**
	§	
Respondent.	§	

ORDER

(Filed Jun. 13, 2003)

Movant has filed an Application for a Certificate of Appealability (docket entry no. 654) along with his Notice of Appeal. Movant requests a Certificate of Appealability ("CoA") to appeal the denial of his 28 U.S.C. § 2255 Motion attacking his 1982 conviction and life sentence for his participation in the conspiracy to murder the late federal Judge John H. Wood, Jr.[1] After due consideration, the Court will deny the request for a CoA.

Federal Rule of Appellate Procedure 22 states a CoA to appeal the denial of a § 2255 motion shall be granted only upon "a substantial showing of the denial of a federal right." To make "a substantial showing of the denial of a federal right," the applicant must demonstrate that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved

[1] Docket entry no. 468.

in a different manner or that the issues presented were "'adequate to deserve encouragement to proceed further.'"[2]

In his § 2255 Motion Movant argued his counsel rendered ineffective assistance at trial and on appeal, that his counsel labored under a conflict of interest at trial and on appeal, and that the Government violated ***Brady v. Maryland.***[3] For over five years, the Court held numerous evidentiary hearings regarding some of Harrelson's claims. To the extent that any issue was not subject to an evidentiary hearing, the Court found that it was an issue that could be plainly resolved from the record. In a thirty page Memorandum Opinion and Order the Court exhaustively addressed Movant's claims and denied his motion for habeas relief.

Movant's instant request for a CoA and attached memorandum reiterates the claims stated in his original habeas application. Movant's instant request also assigns error to this Court's deliberative process, procedural rulings and decision to deny habeas relief. Having once performed the onerous task of reviewing all of the pleadings, motions, and other documents on file in this cause and having thoroughly considered the issues raised in this cause, this Court concludes there is no issue or claim involved in this cause that satisfies the standard for obtaining a CoA.

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[2] ***Slack v. McDaniel***, 529 U.S. 473 (2000) (citing ***Barefoot v. Estelle,*** 463 U.S. 880, 893 n.4, (1983)).

[3] 373 U.S. 83 (1963).

For the reasons more fully stated in this Court's Memorandum Opinion and Order, this Court determines Movant has failed to present a non-frivolous issue for appeal or make a substantial showing of the denial of a federal right.

Accordingly, Movant's request for a Certificate of Appealability (docket entry no. 654) is hereby ***DENIED.***

It is so ORDERED.

SIGNED this 13 day of June 2003.

/s/ Orlando L. Garcia
Orlando L. Garcia
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CHARLES VOYED HARRELSON,	§	
Movant,	§	
v.	§	**CIVIL NO. SA-97-CA-518**
	§	**[SA-82-CR-57(2)]**
UNITED STATES OF AMERICA,	§	
Respondent.	§	

MEMORANDUM OPINION AND ORDER

(Filed Mar. 14, 2003)

Before the Court is Movant Charles Voyed Harrelson's (hereinafter "Movant" or "Harrelson") motion filed pursuant to 28 U.S.C. § 2255 to vacate his conviction and sentence for his participation in the conspiracy to murder the late federal Judge John H. Wood, Jr.[1] Despite having been convicted in December 1982, sentenced to life imprisonment in March 1983, and despite having waited more than ten years after the United States Court of Appeals for the Fifth Circuit affirmed his conviction by published opinion in 1985.[2] Movant conspicuously,

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[1] Docket entry no. 468.

[2] ***See United States v. Harrelson***, 754 F.2d 1153 (5th Cir.1985), ***rehearing denied***, 766 F.2d 186 (5th Cir.1985), ***cert. denied***, 474 U.S. 1034 (1985). The Fifth Circuit's comprehensive opinion affirming Harrelson's complicity in the Wood's murder sets forth the factual background of the case.

yet, timely-filed this instant motion for post-conviction relief on April 23, 1997, a date falling shortly after the death of a key government witness, who testified at trial against Movant, and one day before the statute of limitations expired for the filing of a motion for post-conviction relief as promulgated by the Antiterrorism and Effective Death Penalty Act ("AEDPA").[3] The Government filed an Answer thereto attacking the credibility of Movant's complaints[4] and Movant filed a Reply.[5] After thorough examination of all of the parties' submissions, the extensive testimony and numerous exhibits from the evidentiary hearings and all relevant law, this Court is of the opinion Movant's § 2255 motion should be denied.

Since Movant filed his § 2255 motion in 1997, this Court has generously permitted voluminous discovery, elaborate briefing as well as amended briefing, and lengthy evidentiary hearings, several of which spanned weeks at a time during which the parties passionately presented the arguments and witnesses[6] for and against

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[3] Pub.L. No. 104-132, 110 Stat. 1214 (1996). Defendants whose convictions became final before AEDPA's effective date have a one-year grace period following AEDPA's effective date within which to file a collateral attack to vacate, set aside, or correct their sentence under 28 U.S.C.A. § 2255. Thus, Movant had until April 24, 1997, to timely file his § 2255 motion. Because Movant filed this instant motion on April 23, 1997, Movant's motion is timely.

[4] Docket entry no. 508.

[5] Docket entry no. 514.

[6] Some of the witnesses presented at the evidentiary hearings included Harrelson, his trial/appellate counsel, federal investigators who "worked" the Wood case, and other individuals that had been

(Continued on following page)

post-conviction relief.[7] This Court attests that its investment of judicial resources and time has been enormous, and its review of the extensive record has been exhaustive. Yet, Movant's claims are not complex. Succinctly stated Movant's claims are principally, although not exclusively, complaints about the performance of his counsel.

At trial, Harrelson was represented by Thomas G. Sharpe, Jr. ("Sharpe"),[8] a Brownsville, Texas solo

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investigated for their alleged involvement in the murder of Judge Wood.

[7] The record in this case is large and the various citations thereto are as follows: a) the trial transcripts shall have a roman numeral denoting the volume number followed by the abbreviation "Tr." for transcript, followed by the page number; b) the sentencing transcript shall be cited as "Sent. Tr." followed by the page number; c) the § 2255 hearing transcripts shall be cited as "Hr'g Tr." preceded by the month and year of the hearing and followed by the page number; d) the § 2255 hearing exhibits proffered by Harrelson shall be cited as "H-Hr'g Ex." followed by the exhibit number and page number; and e) the § 2255 hearing exhibits proffered by the Government shall be cited as "Gov't Hr'g Ex." followed by the exhibit number and page number.

[8] Harrelson's instant motion claims that San Antonio attorney Alan Brown ("Brown") also represented him in the Wood murder case. The Court finds this claim to be wholly untenable. While there is evidence that Brown and Harrelson were social acquaintances, there is no credible evidence that Brown represented Harrelson in any legal capacity other than on April 22, 1982, when Brown appeared with Harrelson at Harrelson's initial appearance. At that time, Brown appeared for the limited, express purpose of communicating to the Magistrate Judge, Harrelson's desire that Sharpe be appointed to represent Harrelson. June 2000 Hr'g Tr. 460-63, 477-81. The Court finds all testimony to the contrary that Brown was part of a legal team representing Harrelson to be incredible. The record shows and the testimony proffered at the evidentiary hearings reveals Brown did not legally advise Harrelson, sign any pleadings, conduct any investigations, or make any other court appearances on Harrelson's behalf

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practitioner who had represented Harrelson in three previous murder trials, and whom Harrelson specifically requested to be appointed to his case.[9] The Government proceeded to trial on the theory that Harrelson, a self-proclaimed gambler and contract killer, contracted with Jamiel Chagra (a.k.a. "Jimmy Chagra," a gambler and narcotics dealer) to kill Judge Wood in exchange for money.[10] According to the Government and the testimony adduced at trial, Jimmy Chagra did not want to be tried by Judge Wood on the pending narcotics violations against him[11] because he feared Judge Wood's reputation for imposing maximum sentences in drug cases.[12] Harrelson, in turn, presented an alibi defense wherein

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before, or during, the course of the trial; and he never received any legal fees. June 2000 Hr'g Tr. 147-49, 164, 471. If any legal team existed, it consisted of one solo player, Sharpe and no other.

[9] During the course of these proceedings credible evidence was presented that Harrelson specifically requested Sharpe be appointed to represent him. *See* Docket entry no. 508 at Appendix-Tab C, Brown Decl., & Tab D, Sharpe Decl., and June 2000 Hr'g Tr. 460-63, 477-481. Harrelson, on the other hand, attempted, albeit unsuccessfully, to disavow that he specifically requested Sharpe by voicing incredible, conclusory, allegations that the Government contrived to have Sharpe represent him and that Sharpe then colluded with the Government throughout his trial. June 2000 Hr'g Tr. 226-227, 510. This Court finds these aspects of Harrelson's testimony wholly incredible.

[10] At trial, testimony revealed Harrelson's step-daughter Teresa Starr, traveled to the Las Vegas residence of Jimmy Chagra and took delivery of approximately $250,000 in blood-money.

[11] On February 26, 1979, a Midland-Odessa grand jury returned an indictment against Jimmy Chagra for violating federal drug importation laws. Judge Wood was to preside over the case. XV Tr. 211-214.

[12] Judge Wood's reputation for imposing severe sentences in drug related cases garnered him the nickname "Maximum John." XV Tr. 213-14.

he claimed that he could not have killed Judge Wood on the day Judge Wood was murdered because he was in Dallas that morning. Harrelson further argued that any money he had received from the Chagras was received for future drug transactions.[13] At trial Harrelson took the stand and testified on his own behalf. He also presented a series of alibi witnesses who placed him in Dallas mid-morning on the day of the murder. Review of the trial transcript and the Fifth Circuit's appellate opinion reveals, however, that the Government presented an abundance of lawfully admitted direct and circumstantial evidence inextricably linking Harrelson to Judge Wood's murder – the most damaging of which included the testimony of co-defendant, turned Government witness, Joseph Chagra ("Joe Chagra")[14] that: (1) as early as July, 1979, Jimmy Chagra admitted to Joe he had hired Harrelson to kill Judge Wood,[15] and (2) in early 1980, Harrelson admitted to Joe he had shot Judge

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[13] Although Harrelson testified that he had received tens of thousands of dollars from the Chagras, he maintained it was all part of an elaborate "con" in which he and Pete Kay had convinced the Chagras to "front" them money for drugs. XXX Tr. 70-end and XLI Tr. 49.

[14] Joe Chagra was Jimmy Chagra's brother, XV Tr. 210. Prior to his pleading guilty to conspiring to murder Judge Wood, XVII Tr. 21-27, Joe Chagra was an attorney licensed to practice law in Texas. XV Tr. 210. As part of his plea agreement with the Government, Joe Chagra agreed to testify against Harrelson and Harrelson's co-defendants and the Government agreed to a ten year maximum sentence and to dismiss the remaining counts of the indictments against him. XVII Tr. 21-27.

[15] XV Tr. 224. In fact, on several occasions Jimmy admitted to Joe he had hired Harrelson to murder Judge Wood and despite that Jimmy may have publically denied his involvement in the murder, Jimmy never disclaimed his admissions to Joe. XVI Tr. 68; and XVII Tr. 189, 202-204.

Wood in the back with a high powered rifle as the Judge reached into his car.[16] Other lawfully admitted evidence against Harrelson included: testimony that Harrelson's wife purchased the murder weapon and helped dispose of it,[17] eyewitness testimony that placed Harrelson at the murder scene moments before the fatal shooting of Judge Wood,[18] testimony that Harrelson's step-daughter received the "blood-money" from Jimmy Chagra for Harrelson,[19] and recorded conversations in which Harrelson's role in the murder, the disposition of the murder weapon, and the creation of false explanations relating to the pay-off for the murder were discussed.[20] In short order, Harrelson's alibi defense toppled like a house of cards underneath the weight of the Government's overwhelming evidence of his guilt. The jury, after examining the evidence, listening to the witnesses'

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[16] XV Tr. 232-35. Joe Chagra also testified that Harrelson drew him a map identifying where he [Harrelson] had disposed of the murder weapon. XVI Tr. 13-20. Chagra recreated the map and the map was found in his briefcase when investigators searched his house. *Id.*

[17] XVI Tr. 18.

[18] San Antonio attorney, Chrys Lambros, who lived in the same townhouse complex as Judge Wood, testified that, on the morning of the murder, she saw Harrelson in the complex's parking area and that Harrelson rudely shoved her into the side of the doorway when he exited the parking area. Lambros further testified that as she drove away, she saw Harrelson return to the parking area. 1 Tr. 224-35 and *see Harrelson*, 754 F.2d at 1179 n.26. Despite the opportunity to do so, both at his trial and throughout the many evidentiary hearings held in this § 2255 proceedings, Harrelson has *never* presented any *credible* evidence casting any doubt whatsoever on the credibility of Lambros' identification testimony at Harrelson's trial.

[19] *Harrelson*, 754 F.2d at 1158.

[20] XVI Tr. 44

testimony, weighing their credibility and observing their demeanor, found Harrelson guilty on all counts. The Court sentenced Harrelson to two consecutive life sentences and a consecutive five year term.[21]

I. Authorities and Analysis

A. Scope of Review

Title 28 U.S.C. § 2255 provides relief for a convicted federal criminal defendant who can establish that either: (1) his sentence was imposed in violation of the Constitution or laws of the United States, (2) the sentencing court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, or (4) the sentence is otherwise subject to collateral attack.[22] Thus, § 2255 post-conviction relief is reserved for errors of constitutional dimension and other injuries that could not have been raised on direct appeal and, if left unaddressed, would result in a complete miscarriage of justice.[23]

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[21] Sent. Tr. 26-27.

[22] ***See United States v. Placente***, 81 F.3d 555, 558 (5th Cir. 1996); ***United States v. Seyfert***, 67 F.3d 544, 546 (5th Cir. 1995); and 28 U.S.C. § 2255.

[23] ***See United States v. Cervantes***, 132 F.3d 1106, 1109 (5th Cir. 1998); ***United States v. Payne***, 99 F.3d 1273, 1281 (5th Cir. 1996); ***United States v. Gaudet***, 81 F.3d 585, 589 (5th Cir. 1996); ***United States v. Ressler***, 54 F.3d 257, 259 (5th Cir. 1995); ***United States v. Acklen***, 47 F.3d 739, 741 (5th Cir. 1995); ***United States v. Mimms***, 43 F.3d 217, 219 (5th Cir. 1995); ***United States v. Patten***, 40 F.3d 774, 776 (5th Cir. 1994); ***United States v. Segler***, 37 F.3d 1131, 1133 (5th Cir. 1994); ***United States v. Smith***, 32 F.3d 194, 196 (5th Cir. 1994); ***United States v. Towe***, 26 F.3d 614, 616 (5th Cir. 1994); ***United***

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Section 2255 does not reach errors not of a constitutional or jurisdictional magnitude that could have been reached by a direct appeal.[24] Stated another way, a collateral challenge may not substitute for an appeal.[25] "Nonconstitutional claims that could have been raised in a direct appeal, but were not, may not be asserted in a collateral proceeding."[26] Moreover, a defendant may not raise an issue, regardless of whether constitutional or jurisdictional in nature, for the first time on collateral review without showing both "cause" and "actual prejudice" resulting from the error.[27]

States v. Pierce, 959 F.2d 1297, 1301 (5th Cir. 1992); ***United States v. Vaughn***, 955 F.2d 367, 368 (5th Cir. 1992); ***United States v. Weintraub***, 871 F.2d 1257, 1266 (5th Cir. 1989); and ***United States v. Smith***, 844 F.2d 203, 205-06 (5th Cir. 1988).

[24] ***See United States v. Rocha***, 109 F.3d 225, 229 (5th Cir. 1997); ***United States v. Payne***, 99 F.3d at 1281; ***United States v. Seyfert***, 67 F.3d at 546; ***United States v. Smith***, 32 F.3d at 196; ***United States v. Towe***, 26 F.3d at 616; ***United States v. Pierce***, 959 F.2d at 1301; ***United States v. Vaughn***, 955 F.2d at 368; and ***United States v. Stumpf***, 900 F.2d 842, 845 (5th Cir. 1990) "If the error is not of constitutional or jurisdictional magnitude, the defendant must show the error would result in a complete miscarriage of justice." ***United States v. Segler***, 37 F.3d at 1133, quoting ***United States v. Shaid***, 937 F.2d at 232 n.7.

[25] ***United States v. Shaid***, 937 F.2d 288, 231 (5th Cir.1991).

[26] ***United States v. Payne***, 99 F.3d at 1281; ***United States v. Ressler***, 54 F.3d at 259; ***United States v. Towe***, 26 F.3d at 616.

[27] Generally, "[a] [§ 2255] movant is [procedurally] barred from raising jurisdictional and constitutional claims for the first time on collateral review unless he demonstrates cause for failing to raise the issue on direct appeal and actual prejudice resulting from the error." ***United States v. Patten***, 40 F.3d 774, 776 (5th Cir. 1995). However, the Fifth Circuit has consistently permitted allegations of ineffective assistance of trial or appellate counsel to hurdle the procedural bar and proceed for the first time on collateral review. ***Id.*** and ***see United***

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"For a collateral attack under § 2255, 'a distinction is drawn between constitutional or jurisdictional errors on the one hand, and mere errors of law on the other.'"[28] "A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude, and may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error."[29] Other types of error may not be raised in a collateral attack, unless the defendant demonstrates that the error could not have been raised on direct appeal, and if condoned would result in a complete miscarriage of justice.[30]

Harrelson's instant § 2255 Motion seeks to vacate his conviction and set aside his sentence on the basis

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States v. Guerra, 94 F. 3d 989 (5th Cir. 1996); ***United States v. Placente***, 81 F.3d 555, 558 (5th Cir. 1996); ***United States v. Guadet***, 81 F.3d 585, 589 (5th Cir. 1996); and ***United States v. Acklen***, 47 F.3d 739, 742 (5th Cir. 1995).

[28] ***United States v. Pierce***, 959 F.2d at 1300-01, ***quoting United States v. Capua***, 656 F.2d at 1037.

[29] ***United States v. Pierce***, 959 F.2d at 1301, ***quoting United States v. Shaid***, 937 F.2d at 232. ***Cf. United States v. Patten***, 40 F.3d at 776 (holding that ineffective assistance of counsel satisfies the cause and prejudice standard).

[30] ***See United States v. Patten***, 40 F.3d at 776; and ***United States v. Pierce***, 959 F.2d at 1301, ***quoting United States v. Shaid***, 927 F.2d at 232 n.7; see also ***United States v. Segler***, 37 F.3d at 1133; ***United States v. Smith***, 32 F.3d at 196 (holding that a § 2255 movant is not entitled to relief on any ground that he could have asserted on direct appeal but failed to do so only upon a showing that a failure to address the merits of his ground for relief would result in a miscarriage of justice); and ***United States v. Vaughn***, 955 F.2d at 368.

that the Government obtained his conviction by violating his Fifth Amendment[31] due process rights by failing to disclose potentially exculpatory information in its possession and that his counsel rendered ineffective assistance at trial and on appeal in violation of his Sixth Amendment[32] right to effective assistance of counsel.

Notwithstanding his specific claims of ineffective assistance of counsel, if Harrelson did not raise any of the instant claims on direct appeal, he would be procedurally barred from raising constitutional claims for the first time on collateral review. However he may overcome the procedural bar by either: affirmatively

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[31] The Fifth Amendment reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

[32] The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. CONST. amend. VI.

demonstrating both "cause" for failing to raise the issue on direct appeal *and* "actual prejudice" resulting from the error,[33] or (2) satisfying the fundamental miscarriage of justice test.[34]

The "cause" standard requires a movant to show that some objective factor external to the defense, such as interference by officials or ineffective assistance, prevented him from raising on direct appeal the claim he now advances.[35] To satisfy the "actual prejudice" standard, the movant must show that, but for the error, he would not have been convicted.[36] Establishment of ineffective assistance of counsel is generally sufficient to satisfy the cause and prejudice standard.[37]

To satisfy the miscarriage of justice standard, the movant must make a colorable showing of factual

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[33] ***United States v. Cervantes***, 132 F.3d at 1109; ***United States v. Gaudet***, 81 F.3d at 589; ***United States v. Acklen***, 47 F.3d at 741-42; ***United States v. Mimms***, 43 F.3d at 219; ***United States v. Patten***, 40 F.3d at 776; and ***United States v. Segler***, 37 F.3d at 1133, ***quoting United States v. Shaid***, 937 F.2d 228, 232 (5th Cir. 1991).

[34] ***See United States v. Segler***, 37 F.3d at 1133; and ***United States v. Smith***, 32 F.3d at 196 (holding that a § 2255 movant is not entitled to relief on any ground that he could have asserted on direct appeal but failed to do so only upon a showing that a failure to address the merits of his ground for relief would result in a miscarriage of justice).

[35] ***See United States v. Guerra***, 94 F.3d at 993.

[36] ***Id.***, at 994.

[37] ***See United States v. Kallestad***, 236 F.3d at 227; ***United States v. Guerra***, 94 F.3d at 994; ***United States v. Placente***, 81 F.3d at 558; ***United States v. Gaudet***, 81 F.3d at 589; ***United States v. Acklen***, 47 F.3d at 742; and ***United States v. Patten***, 40 F.3d at 776.

innocence.[38] To satisfy the "factual innocence" standard, a movant must establish a fair probability that, considering all of the evidence now available, the trier of fact would have entertained a reasonable doubt as to the defendant's guilt.[39] Put more simply, the movant must demonstrate that, in light of all the evidence, it is more likely than not that no reasonable juror would have convicted him.[40] The government is not limited to the existing record to rebut any showing the movant may make regarding actual innocence.[41]

Harrelson failed to raise many of his claims on direct appeal and, thus, it is the Court's firm belief that he is procedurally barred from raising same for the first time on a collateral review without first showing cause

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[38] *See Sawyer v. Whitley*, 505 U.S. 333, 339-40 (1992); ***Williams v. Whitley***, 994 F.2d 226, 233 (5th Cir. 1993); ***Montoya v. Collins***, 988 F.2d 11, 13 (5th Cir. 1993); ***May v. Collins***, 955 F.2d 299, 308 (5th Cir. 1992); and ***Sawyer v. Whitley***, 945 F.2d 812, 815 (5th Cir. 1991).

[39] *See Sawyer v. Whitley*, 505 U.S. at 336-41 (holding "factual innocence" means a fair probability that, in light of all the evidence, the trier of the facts would have entertained a reasonable doubt as to the defendant's guilt); ***Kuhlmann v. Wilson***, 477 U.S. 436, 455 n.17 (1986); ***Johnson v. Hargett***, 978 F.2d 855, 859-60 (5th Cir. 1992); ***May v. Collins***, 955 F.2d at 308; and ***Sawyer v. Whitley***, 945 F.2d at 817. The "factual innocence" test, therefore, requires the Court to give consideration to all of the evidence now available to the Court on the issue of the petitioner's guilt or innocence.

[40] *See Bousley v. United States*, 523 U.S. at 622; ***Schlup v. Delo***, 513 U.S. 298, 327-28 (1995); ***United States v. Jones***, 172 F.3d 381, 384 (5th Cir. 1999); ***United States v. Sorrells***, 145 F.3d at 750; ***United States v. Rodriguez***, 104 F.3d 694, 697 (5th Cir. 1997) (holding that "actual innocence" means factual, as opposed to legal innocence, i.e., a showing that a person did not commit the crime); and ***Johnson v. Hargett***, 978 F.2d 855, 859-60 (5th Cir. 1992) (holding same).

[41] *See United States v. Jones*, 172 F.3d at 384.

for failing to raise the defaulted argument on direct appeal and actual prejudice resulting from the procedural default – rudimentary showings that Harrelson and his able counsel never once argued. Although, the District Court may invoke the issue of procedural default *sua sponte*,[42] this Court has decided to address the merits of Harrelson's claims because the proceedings in this case have been so protracted and because the Court has expended considerable time and resources reviewing same.

1. Preliminary Matters

Woven throughout the fabric of several of Harrelson's claims is his contention that he was represented by both attorneys Thomas Sharpe and Alan Brown, and that their "co-representation" of him created a conflict of interest for Sharpe which ultimately prevented Sharpe from arguing to the jury that Brown was involved in Judge Wood's murder.[43] When Harrelson initially filed his § 2255 motion he argued that a conflict of interest arose because Alan Brown was Sharpe's "co-counsel" before and during his trial. However, in the many years since then, Harrelson has recharacterized

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[42] ***United States v. Willis***, 273 F.3d 592 (5th Cir. 2001), ***quoting Smith v. Johnson***, 216 F.3d 521, 523-24 (5th Cir. 2000) (raising the procedural bar in a § 2254 case, *sua sponte* at the appellate level).

[43] During the massive investigation for Judge Wood's killer, the FBI questioned many individuals whom had been implicated in Judge Wood's murder. Allegations, known as the "Riojas allegations" (addressed *infra*) lodged by seasoned criminal Roberto Farias Riojas, Jr., led the FBI to investigate Alan Brown and several of his clients.

Brown's role as one of an "investigator and advisor."[44] Regardless of Harrelson's characterization of Brown's role, as noted *supra* in footnote number eight, this Court finds Harrelson has failed to present any *credible* evidence that Brown represented Harrelson in any legal capacity other than on April 22, 1982, when Brown appeared with Harrelson at Harrelson's initial appearance for the limited, express purpose of communicating to the Magistrate Judge that Harrelson wanted Sharpe to be his appointed counsel.[45] The Court finds all testimony suggesting that Brown was part of a legal team representing Harrelson, at any point, to be wholly incredible. The record and all evidence presented during the evidentiary hearings affirmatively show Brown did not legally advise Harrelson, sign any pleadings, conduct any investigations, or make any other court appearances on Harrelson's behalf before, during, or after the trial; and he never received any fees from Harrelson's case.[46] The credible evidence before this Court establishes beyond any reasonable doubt that Sharpe, and Sharpe alone, represented Harrelson. Because Brown was not involved in Harrelson's defense, Sharpe was free to argue to the jury that Brown and his clients murdered Judge Wood. Sharp, however, rejected the tactic of making an unsupportable accusation against Brown after examining, investigating, and ultimately rejecting the theory that Brown and his clients were involved in the judge's

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[44] June 2000 Hr'g Tr. 165.

[45] June 2000 Hr'g Tr. 460-63, 477-81.

[46] June 2000 Hr'g Tr. 147-49, 164, 471.

murder.[47] Given the absence of any credible evidence supporting the theory implicating Brown, this Court will not second guess Sharpe's tactical decision to pursue a different defensive theory at Harrelson's trial. Accordingly, Sharpe did not labor under any conflict of interest while he represented Harrelson at any time, whether it be before trial, during trial, or on direct appeal – and Harrelson's claim otherwise is without merit.

2. *Brady* Violation

Harrelson claims the Government failed to disclose to Sharpe (1) allegedly exculpatory information relating to other suspects whom law enforcement agencies had investigated and (2) allegedly exculpatory evidence regarding the bullet which killed Judge Wood. The Court finds Harrelson's claims fail to prevail under the standard announced in ***Brady v. State of Maryland***.[48]

In ***Brady***, the Supreme Court held the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of good faith or bad faith of the prosecution.[49] To establish a ***Brady*** violation, and thus a violation of one's right to due

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[47] ***See*** Docket entry no. 508 at Appendix Tab D, Sharpe Decl.; June 2000 Hr'g Tr. 33-54; and August 1998 Hr'g Tr. 131-144.

[48] 373 U.S. 83, 87 (1963).

[49] ***Id.*** and ***see Martin v. Cain***, 206 F.3d 450, 456 (5th Cir. 2000); ***Little v. Johnson***, 162 F.3d 855, 861-62 (5th Cir. 1998); ***United States v. Rich***, 141 F.3d 550, 553 (5th Cir. 1998); ***Pyles v. Johnson***, 136 F.3d 986, 998 (5th Cir. 1998); ***Goodwin v. Johnson***, 132 F.3d 162, 186 (5th Cir. 1997); and ***Kopycinski v. Scott***, 64 F.3d 223, 225 (5th Cir. 1995).

process, the criminal defendant must show (1) the prosecution suppressed or withheld evidence, including impeachment and inadmissible evidence (2) which was favorable, and (3) *material* to his guilt.[50] Evidence is *not* suppressed if the defendant either knew, should have known, or with the exercise of due diligence could have learned, of the essential facts permitting him to take advantage of the exculpatory evidence.[51]

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[50] ***See United States v. Bagley***, 473 U.S. 667, 682 (1985); ***United States v. Hughes***, 230 F.3d 815, 819 (5th Cir. 2000); ***Martin v. Cain***, 206 F.3d at 456; ***Pyles v. Johnson***, 136 F.3d at 998; ***Goodwin v. Johnson***, 132 F.3d at 186; ***Boyle v. Johnson***, 93 F.3d 180, 186 (5th Cir. 1996); ***Kopycinski v. Scott***, 64 F.3d at 225; and ***East v. Scott***, 55 F.3d 996, 1002 (5th Cir. 1995). However, to be relevant for impeachment purposes, withheld evidence must be contrary to a prosecution witness's actual trial testimony. ***See Thompson v. Cain***, 161 F.3d 802, 806-07 (5th Cir. 1998); and ***see Spence v. Johnson***, 80 F.3d 989, 1005 n.14 (5th Cir. 1996) (inadmissible evidence material).

[51] ***See United States v. Garza***, 165 F.3d 312, 314 (5th Cir. 1999) (holding the prosecution is not obligated to conduct a defendant's investigation or to make a defendant's case for him); ***In re Smith***, 142 F.3d at 836 (holding no ***Brady*** claim arises if defendant, using reasonable diligence, could have obtained the information); ***East v. Johnson***, 123 F.3d at 239 (holding the materiality prong of this test is *not* a sufficiency of the evidence test); ***United States v. Mmahat***, 106 F.3d 89, 94 (5th Cir. 1997) (holding defendant must show that the information allegedly withheld was unavailable to him through due diligence); ***United States v. Aubin***, 87 F.3d 141, 148-49 (5th Cir. 1996) (holding that due diligence on the part of the defendant is a necessary element in a successful ***Brady*** claim and that the government is not obligated to conduct a defendant's investigation or to make a defendant's case for him); ***Lawrence v. Lensing***, 42 F.3d at 257; ***Williams v. Scott***, 35 F.3d at 163 (holding no ***Brady*** violation arises if the defendant, using reasonable diligence, could have obtained the information); and ***Blackmon v. Scott***, 22 F.3d at 564-65 (holding the state is not required to furnish the defendant with exculpatory evidence that is

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"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[52] A reasonable probability of a different result is shown when non-disclosure puts the case in a different light so as to undermine confidence in the jury verdict.[53] Both the Supreme Court and Fifth Circuit have analogized the "materiality" standard under ***Brady*** to the "prejudice"

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fully available to the defendant or that could be obtained through reasonable diligence).

[52] ***Bagley***, 473 U.S. at 682; and ***see Wood v. Bartholomew***, 516 U.S. at 1, 5 (1995); ***Kyles v. Whitley***, 514 U.S. 419, 434-35 (1995); ***United States v. Bagley***, 473 U.S. at 682; ***United States v. Hughes***, 230 F.3d at 819; ***Martin v. Cain***, 206 F.3d at 457; ***United States. v. Maloof***, 205 F.3d 819, 825 (5th Cir. 2000); ***Little v. Johnson***, 162 F.3d at 861-62; ***United States v. Lowder***, 148 F.3d at 550-51; ***In re Smith***, 142 F.3d at 836; ***Pyles v. Johnson***, 136 F.3d at 999-1000 (holding additional impeachment evidence having only an incremental impeachment value did not satisfy materiality standard); ***Goodwin v. Johnson***, 132 F.3d at 186; ***East v. Johnson***, 123 F.3d at 237-39 (holding the petitioner carrys [sic] the burden to show materiality by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict); ***United States v. Fisher***, 106 F.3d at 634; ***Jimenez v. Trominski***, 91 F.3d at 768; ***Westley v. Johnson***, 83 F.3d at 725; ***Kopycinski v. Scott***, 64 F.3d at 225; ***East v. Scott***, 55 F.3d at 1002; ***Allridge v. Scott***, 41 F.3d at 217; ***Williams v. Scott***, 35 F.3d at 159; and ***Blackmon v. Scott***, 22 F.3d at 564.

[53] ***Kyles v. Whitley***, 514 U.S. at 434-35; ***Little v. Johnson***, 162 F.3d at 862; ***East v. Johnson***, 123 F.3d at 239-40; ***United States v. Gonzales***, 121 F.3d 928, 946 (5th Cir. 1997); ***Spence v. Johnson***, 80 F.3d at 994; and ***Kopycinski v. Scott***, 64 F.3d at 226. Merely cumulative evidence does not satisfy the ***Brady*** materiality standard. ***See United States v. Gonzales***, 121 F.3d at 946; ***Westley v. Johnson***, 83 F.3d at 725; ***Spence v. Johnson***, 80 F.3d at 995; and ***Allridge v. Scott***, 41 F.3d at 218.

standard under ***Strickland***.[54] The defendant bears the burden of establishing a reasonable probability that the evidence would have changed the result.[55] If materiality is established, no harmless error analysis is employed.[56]

Harrelson contends the Government violated ***Brady*** and thus, violated his due process rights by withholding information that included the allegations of Roberto Farias Riojas, Jr. ("Riojas") which implicated persons other than Harrelson in Judge Wood's murder ("the Riojas allegations") and several reports of the Government's ensuing investigations of said allegations.[57] Harrelson, also asserts the Government withheld from the defense information that Alan Brown made phone calls to some of his clients shortly after the judge's death and, shortly before the murder a loan was made between Jack Strauss and Sonny De La Fuente, two of the several individuals implicated in the Riojas allegations.

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[54] ***See Kyles v. Whitley***, 514 U.S. at 434-35; and ***see Martin v. Cain***, 206 F.3d at 457 (analogizing the ***Brady*** materiality standard with the prejudice prong of ***Strickland***); and ***Johnson v. Scott***, 68 F.3d 106, 109 n.5 (5th Cir. 1995).

[55] ***See Strickler v. Greene***, 527 U.S. at 291; and ***United States v. Hughes***, 230 F.3d at 819.

[56] ***See Kyles v. Whitley***, 514 U.S. at 434-38; ***Pyles v. Johnson***, 136 F.3d at 998; ***Goodwin v. Johnson***, 132 F.3d at 187; and ***Kopycinski v. Scott***, 64 F.3d at 226.

[57] These reports included one prepared by Customs Agent Jack Compton, and a chronology prepared by former U.S. Attorney Boyd. Harrelson maintains these reports bolster the credibility of Riojas' allegations and further support his position that he did not murder Judge Wood. This Court disagrees. The reports merely demonstrate the Government investigated Riojas' allegations, as it had thoroughly investigated other leads it had received.

Because claims of ***Brady*** violations should not be taken lightly, this Court held numerous evidentiary hearings regarding the Riojas allegations and the Government's alleged non-disclosure of the reports relating to said allegations. Harrelson asserts that, had he had the information that ***Brady*** guaranteed him, he would have been able "to show that someone else killed Judge Wood, [and] the jury would have been far more likely to accept his alibi defense."[58] Contrary to Harrelson's assertions otherwise, the Court finds, for several equally compelling reasons, that the Government did not commit a ***Brady*** violation. ***Brady*** claims involve "the discovery, *after* trial of information which had been known to the prosecution but *unknown* to the defense."[59] In the instant case, in August 1982, and *prior* to trial, the Government, disclosed the contents of the Riojas allegations to Harrelson in the form of several FBI 302 reports which contained detailed information regarding the Riojas allegations.[60] Moreover, at the evidentiary hearings Sharpe testified to having had full knowledge of the Riojas allegations prior to trial and that he knew the majority of the content in the investigative reports from both the Government's disclosures and

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[58] Docket entry no. 468 at 22-23.

[59] ***United States v. Agurs***, 427 U.S. 97 (1976) (emphasis added).

[60] ***See*** Docket entry no. 508 at Appendix Tab D, Sharpe Decl.; June 2000 Hr'g Tr 33-36 & 81-82. Although, Harrelson claims that he only recently learned the FBI had investigated Alan Brown in connection with Judge Wood's murder, the Court found his claims to be incredible. At the evidentiary hearings, both Sharpe and Brown credibly testified to having discussed with Harrelson, prior to Harrelson's trial, Brown's status as a suspect.

media coverage of the murder investigation.[61] Additionally, Sharpe testified to having determined the Riojas allegations were of no value to Harrelson's defense after he had read the FBI's 302 reports and had conducted his own investigation into the allegations contained therein.[62] Thus, the Government did *not* fail to disclose the Riojas allegations to Sharpe. Moreover, evidence that law enforcement authorities investigated other suspects is not, in itself, exculpatory.

Nonetheless, even if the Government had not disclosed the Riojas allegations and reports of the ensuing investigation to Sharpe, Harrelson has not presented any credible evidence to this Court establishing that the purportedly withheld evidence would have impeached a government witness or was exculpatory. This Court's independent review of the voluminous evidence establishes beyond any doubt that the allegedly withheld documents do not satisfy the material standard under ***Brady***. Harrelson has failed to carry his burden of establishing a reasonable probability that this particular evidence would have changed the result of his trial.[63] While the names of others investigated at one time or another in the course of the inquiry into the murder of Judge Wood, might have been helpful, it is not likely that

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[61] ***See*** Docket entry no. 508 at Appendix Tab D, Sharpe Decl.; June 2000 Hr'g Tr. 33-54; and August 1998 Hr'g Tr. 131-144.

[62] ***Id.*** Sharpe and the other defense counsel believed that Riojas's unsavory character presented damaging credibility problems if any of the defendants called him as a witness. August 1998 Hr'g Tr. 131-144 & 181-182.

[63] ***See Strickler v. Greene***, 527 U.S. at 291; and ***United States v. Hughes***, 230 F.3d at 819.

the information would reasonably have led to a different verdict at Harrelson's trial. The Government produced an abundance of credible direct and circumstantial evidence linking Harrelson to the murder including: testimony that placed him in the parking area of Judge Wood's townhouse complex shortly before and after the murder, Harrelson's admission to Joe Chagra that he fired a "clear shot" at Judge Wood and the taped recordings wherein cover-ups and disposing of the weapon were discussed. Although, the Riojas allegations and the other related reports did not implicate Harrelson, they did not exculpate him either. Simply stated, the Riojas allegations do not lead to a reasonable probability that the jury would have found Harrelson not guilty of murdering and conspiring to murder Judge Wood. As Harrelson cannot show that the evidence would reasonably have changed his guilty verdict, his claim of a ***Brady*** violation does not succeed. Accordingly, this Court rejects Harrelson's ***Brady*** claim regarding the Riojas allegations and related government reports. Additionally, for similar reasons, it rejects Harrelson's related claim of ineffective assistance of counsel.

Although Harrelson's § 2255 motion claims the Government withheld "exculpatory evidence" regarding the bullet which killed Judge Wood,[64] Harrelson has yet to identify any such evidence the Government allegedly withheld. Instead, under the cloak of a ***Brady*** violation, Harrelson disingenuously argues the Government elicited

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[64] Additionally, this Court believes Harrelson procedurally defaulted this claim and cannot find any reason why this exact same claim could not have been raised on direct appeal.

false, inaccurate or misleading ballistics testimony at trial from its FBI firearms expert. Such arguments do not constitute a ***Brady*** claim. Thus, this Court finds that no ***Brady*** violation exists regarding any unidentified, withheld, ballistics evidence and that Harrelson has failed to satisfy the first prong of ***Brady*** – he has failed to show the prosecution suppressed or withheld any ballistics "evidence which had been known to the prosecution but *unknown* to the defense."[65] Accordingly, Harrelson's claim that the Government withheld or suppressed ballistic evidence in violation of ***Brady*** fails.

Insofar as this claim asserts Harrelson should be awarded a new trial because the Government's case at trial included false testimony, the Court finds this claim to be without merit because Harrelson has not met his burden of showing that any identified trial testimony of the prosecution's firearms expert was (1) actually false; (2) any such testimony was material, and (3) that the prosecution knew such testimony to be false.[66]

3. Ineffective Assistance of Counsel Claims

Harrelson asserts his counsel, Sharpe, rendered ineffective assistance at trial and on appeal. For the

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[65] ***United States v. Agurs***, 427 U.S. 97 (1976).

[66] ***See United States v. Martinez-Mercado***, 888 F.2d 1484, 1492 (5th Cir. 1989) (due process violation when government *knowingly* elicits, or fails to correct, materially false statements from its witnesses) (emphasis added); and ***see United States v. Mack***, 695 F.2d 820, 822-23 (5th Cir. 1983).

foregoing reasons this Court finds these claims fail under ***Strickland v. Washington***.[67]

In ***Strickland v. Washington***, the Supreme Court articulated the constitutional standard for determining whether a criminal defendant has been denied the effective assistance of counsel, as guaranteed by the Sixth Amendment:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.[68]

When a convicted petitioner asserts claims of ineffective assistance of counsel, the petitioner carries the burden of demonstrating both counsel's deficient performance and resultant prejudice under ***Strickland***.[69]

In order to establish that his counsel's performance was constitutionally deficient, a convicted defendant must

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[67] 466 U.S. 668, 687 (1984).

[68] ***Strickland v. Washington***, 466 U.S. at 687 (1984).

[69] ***Burnett v. Collins***, 982 F.2d 922, 928 (5th Cir. 1993); and ***Martin v. Maggio***, 711 F.2d 1273, 1279 (5th Cir. 1983).

show that counsel's representation "fell below an objective standard of reasonableness."[70] In so doing, a convicted defendant must carry the burden of proof and overcome a strong presumption that trial counsel's conduct falls within a wide range of reasonable professional assistance.[71] The courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight.[72] It is strongly presumed that counsel has rendered adequate assistance

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[70] ***Williams v. Taylor***, 529 U.S. 362, 390-91 (2000); ***Darden v. Wainwright***, 477 U.S. 168, 184 (1986); ***Strickland v. Washington***, 466 U.S. at 687-88; ***Lackey v. Johnson***, 116 F.3d 149, 152 (5th Cir. 1997); ***Andrews v. Collins***, 21 F.3d 612, 621 (5th Cir. 1994); ***Duff-Smith v. Collins***, 973 F.2d 1175, 1182 (5th Cir. 1992); and ***Black v. Collins***, 962 F.2d 394, 401 (5th Cir. 1992).

[71] ***See Strickland v. Washington***, 466 U.S. at 687-91; ***Jones v. Cain***, 227 F.3d 228, 231 (5th Cir. 2000) (holding trial counsel's decision not to put defendant on the stand in light of defendant's prior criminal record is a judgment call which seldom, if ever, will support a claim of ineffective assistance); ***Green v. Johnson***, 160 F.3d 1029, 1035 n.1 (5th Cir. 1998); ***Carter v. Johnson***, 131 F.3d 452, 463 (5th Cir. 1997); ***Belyeu v. Scott***, 67 F.3d 535, 538 (5th Cir. 1995); and ***Duff-Smith v. Collins***, 973 F.2d at 1182.

[72] ***See Lockhart v. Fretwell***, 506 U.S. 364, 372 (1993); ***Burger v. Kemp***, 483 U.S. 776, 789 (1987); ***Strickland v. Washington***, 466 U.S. at 689, 104 S.Ct. at 2065-66; ***United Stats*** [sic] ***v. Drones***, 218 F.3d 496, 500-03 (5th Cir. 2000) (holding trial counsel's failure to explore possibility of spectrographic analysis of voice on tape recording was objectively reasonable where there was legitimate doubt as to admissibility of testimony regarding same); ***Carter v. Johnson***, 131 F.3d at 463; ***Williams v. Cain***, 125 F.3d 269, 276 (5th Cir. 1997) (holding that review of the first prong of ***Strickland*** requires consideration of the facts and resources available to defense counsel at the time of trial); ***Green v. Johnson***, 116 F.3d 1115, 1122 (5th Cir. 1997); and ***see Westley v. Johnson***, 83 F.3d 714, 723 (5th Cir. 1996) (holding the deficiency prong of ***Strickland*** is judged by counsel's conduct under the law existing at the time of the conduct).

and made all significant decisions in the exercise of reasonable professional judgment.[73] An attorney's strategic choices, usually based on information supplied by the defendant and from a thorough investigation of relevant facts and law are virtually unchallengeable.[74] Counsel is required neither to advance every non-frivolous argument nor to investigate every conceivable matter inquiry into which could be classified as non-frivolous.[75] In fact, "[a] conscious and informed decision on trial tactics and strategy cannot be the basis for constitutionally ineffective assistance of counsel unless it is so ill chosen that it

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[73] ***See Strickland v. Washington***, 466 U.S. at 690; ***Duff-Smith v. Collins***, 973 F.2d at 1182.

[74] ***See Jones v. Jones***, 163 F.3d 285, 300 (5th Cir. 1998); ***Ransom v. Johnson***, 126 F.3d 716, 721 (5th Cir. 1997); ***Bryant v. Scott***, 28 F.3d 1411, 1435 (5th Cir. 1994), ***citing Strickland v. Washington***, 466 U.S. at 691; and ***Andrews v. Collins***, 21 F.3d at 623 (holding that counsel acted reasonably in failing to further pursue the defendant's mental capacity or background where counsel had no reason to believe that further investigation would be useful).

[75] ***See Neal v. Cain***, 141 F.3d 207, 214-15 (5th Cir. 1998) (holding petitioner's complaints regarding counsel's failure to raise specific defenses did not satisfy prejudice prong of ***Strickland***, where proposed defenses were without merit); ***Sones v. Hargett***, 61 F.3d 410, 415 n.5 (5th Cir. 1995) (counsel not deficient for failing to pursue frivolous point); ***United States v. Gibson***, 55 F.3d 173, 179 (5th Cir. 1995) (the Sixth Amendment does not require counsel to file meritless motions); ***Smith v. Collins***, 977 F.2d 951, 960 (5th Cir. 1992) ("The defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources.") ***Koch v. Puckett***, 907 F.2d 524, 527 (5th Cir. 1990) (counsel is not required to make futile motions or objections); and ***Schwander v. Blackburn***, 750 F.2d 494, 500 (5th Cir. 1985) (holding that defense counsel is not required to investigate everyone whose name is mentioned by the defendant).

permeates the entire trial with obvious unfairness."[76] A criminal defense counsel is not required to exercise clairvoyance during the course of a criminal trial.[77] Likewise, the Sixth Amendment does not require counsel to do the impossible or unethical; if there is no bona fide defense to the charge, counsel is not required to create one.[78]

The proper standard for evaluating counsel's performance under the Sixth Amendment is "reasonably effective assistance."[79] "An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment."[80] "Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[81] In order to establish that he has sustained prejudice, the convicted defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to

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[76] ***Green v. Johnson***, 116 F.3d 1115, 1122 (5th Cir. 1997).

[77] ***See Sharp v. Johnson***, 107 F.3d 282, 290 n.28 (5th Cir. 1997), ***citing Garland v. Maggio***, 717 F.2d 199, 207 (5th Cir. 1983) (holding clairvoyance is not a required attribute of effective representation). ***See also Lackey v. Johnson***, 116 F.3d at 152 (holding trial counsel not ineffective for failing to discover evidence that defendant knew about but withheld from his counsel).

[78] ***See United States v. Cronic***, 466 U.S. 648, 656 n.19 (1984); and ***Jones v. Jones***, 163 F.3d at 303.

[79] ***Strickland v. Washington***, 466 U.S. at 687; ***Bullock v. Whitley***, 53 F.3d 697, 700 (5th Cir. 1995).

[80] ***Strickland v. Washington***, 466 U.S. at 691.

[81] ***Id.*** at 692.

undermine confidence in the outcome."[82] The prejudice prong of ***Strickland*** focuses on whether counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair; unreliability or unfairness does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.[83]

The Supreme Court and the Fifth Circuit have applied the two-part test of ***Strickland v. Washington***, ***supra***, to a wide variety of contextual challenges to the effectiveness of counsel's performance. Given the language of ***Strickland***, itself, the test applies to the conduct of counsel both in preparation for and at trial.[84] An attorney's failure to investigate the case against the defendant and to interview witnesses can support a finding of ineffective assistance.[85] However, in order to establish that counsel was rendered ineffective by virtue of a failure to investigate the case against a defendant or to discover and present evidence, a convicted defendant must do more than merely allege a failure to investigate; he must state with specificity what the investigation would have revealed, what evidence would have resulted from that

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[82] ***Williams v. Taylor***, 529 U.S. at 391; ***Strickland v. Washington***, 466 U.S. at 694.

[83] ***Williams v. Taylor***, 529 U.S. at 393 n.17; ***Strickland v. Washington***, 466 U.S. at 692, 104.

[84] ***See, e.g., Martin v. McCotter***, 796 F.2d 813, 816-17 (5th Cir. 1986) (holding the ***Strickland*** test applied to both the trial and sentencing phases of a criminal proceeding); and ***Nealy v. Cabana***, 764 F.2d 1173, 1178-80 (5th Cir. 1985).

[85] ***See Moore v. Johnson***, 194 F.3d 586, 608 & 616 (5th Cir. 1999); and ***Bryant v. Scott***, 28 F.3d at 1435.

investigation, and how such would have altered the outcome of the case.[86] Furthermore, when a trial counsel's decision not to pursue further investigation into a potential defense or into an area of potential mitigating evidence is based on investigation and consultation with the defendant which leads the attorney to believe that further investigation would be fruitless, that decision may not be challenged as unreasonable.[87] The extent of an attorney's investigation into an area must be viewed in the context of the defendant's cooperation with the attorney's investigation and with a heavy measure of deference to counsel's judgments.[88]

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[86] ***See Moawad v. Anderson***, 143 F.3d 942, 948 (5th Cir. 1998); ***Anderson v. Collins***, 18 F.3d 1208, 1221 (5th Cir. 1994); ***Nelson v. Hargett***, 989 F.2d 847, 850 (5th Cir. 1993); ***United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989); ***Lockhart v. McCotter***, 782 F.2d 1275, 1282-83 (5th Cir. 1986); ***Alexander v. McCotter***, 775 F.2d 595, 603 (5th Cir. 1985); ***Schwander v. Blackburn***, 750 F.2d 494, 499-500 (5th Cir. 1985); and ***Ross v. Estelle***, 694 F.2d 1008, 1011 (5th Cir. 1983).

[87] ***See Carter v. Johnson***, 131 F.3d at 465; ***Boyle v. Johnson***, 93 F.3d at 187-88; ***West v. Johnson***, 92 F.3d at 1406-09; and ***Andrews v. Collins***, 21 F.3d at 623.

[88] ***See Carter v. Johnson,*** 131 F.3d at 463; and ***Randle v. Scott,*** 43 F.3d 221, 225 (5th Cir. 1995) (holding trial counsel not ineffective for failing to investigate the validity of the defendant's prior conviction where the defendant was aware that the prior conviction had been reversed but failed to disclose same to his counsel and, instead, instructed his counsel to cease investigation into the matter so as to expedite the defendant's entry of a guilty plea); ***but see Ransom v. Johnson,*** 126 F.3d at 723 (an attorney who is aware of potential mitigating evidence is obligated to investigate the existence of such evidence beyond merely communicating with the defendant).

The two-part ***Strickland*** test also applies to the performance of counsel on appeal.[89] Where a defendant is either actually or constructively denied the assistance of counsel on appeal, however, prejudice is presumed.[90] While it is true that actual or constructive denial of counsel on appeal results in a presumption of "prejudice," as that term is defined under the ***Strickland*** test, a claim of merely ineffective assistance by appellate counsel still requires the petitioner to satisfy the prejudice prong of that test.[91] Thus, a petitioner who argues that counsel failed to assert or fully brief a particular claim must show that his attorney's performance was both deficient and prejudicial.[92] Where a defendant's appellate counsel

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[89] ***See United States v. Phillips***, 210 F.3d 345, 348-50 (5th Cir. 2000); ***Andrews v. Collins,*** 21 F.3d at 625; ***Sharp v. Puckett,*** 930 F.2d 450, 451 (5th Cir. 1991); ***Lofton v. Whitney*** 905 F.2d 885, 887-88 (5th Cir. 1990); and ***McCoy v. Lynaugh,*** 874 F.2d 954, 962-63 (5th Cir. 1989).

[90] ***See Penson v. Ohio,*** 488 U.S. 75, 86-89 (1988) (holding the prejudice prong of the ***Strickland*** test does *not* apply in cases where appellate counsel withdraws without first filing an ***Anders*** *brief);* ***Hughes v. Booker,*** 220 F.3d at 346, 349 (5th Cir. 2000); ***White v. Johnson***, 180 F.3d 648, 650 (5th Cir. 1999) (holding a defendant denied his right to appeal because his counsel failed to advise him of his right to appeal, the procedure and time limits involved, and the right to appointed counsel on appeal need not show prejudice); ***Jackson v. Johnson***, 150 F.3d 520, 524-25 (5th Cir. 1998) (holding a constructive denial of counsel on appeal occurs only where counsel's ineffectiveness is so egregious as to effectively deny the defendant any meaningful assistance at all); and ***United States v. Riascos***, 76 F.3d 93, 94 (5th Cir. 1996) (holding that complete denial of counsel on appeal, whether actual or constructive, creates presumption of prejudice).

[91] ***See Hughes v. Booker,*** 220 F.3d at 349; ***Jackson v. Johnson***, 150 F.3d at 525; ***Moss v. Collins,*** 963 F.2d at 48; and ***Lofton v. Whitley***, 905 F.2d at 887.

[92] ***Hughes v. Booker***, 220 F.3d at 349.

presented, briefed, and argued, albeit unsuccessfully, one or more non-frivolous grounds for relief on appeal, the defendant was neither actually nor constructively denied assistance of counsel on direct appeal.[93]

In the context of evaluating the prejudice prong of ***Strickland*** as applied to a claim of ineffective assistance on appeal, the fairness and reliability of the appeal are necessarily functions of the fairness and reliability of the trial.[94] Satisfying the prejudice prong of ***Strickland*** in the connection with a claim of ineffective assistance by appellate counsel requires more than a mere complaint about deficiencies in an appellate brief.[95] Appellate counsel are not required to present patently frivolous arguments on

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[93] ***See Jackson v. Johnson,*** 150 F.3d at 525; ***Moss v. Collins,*** 963 F.2d at 48; and ***Lofton v. Whitley***, 905 F.2d at 887.

[94] ***See Mayabb v. Johnson,*** 168 F.3d 863, 869 (5th Cir. 1998) (holding that when the court finds no prejudice arising from trial counsel's failure to raise or argue a point, by extension, there cannot be any prejudice from appellate counsel's alleged error predicated on the same issue); ***Jackson v. Johnson***, 150 F.3d at 525-26 (holding the focus on mere outcome determination at the appellate level is defective and that the presence or absence of prejudice hinges on the fairness of the trial and the reliability of the judgment of conviction resulting therefrom); and ***Goodwin v. Johnson,*** 132 F.3d 162, 174-76 (5th Cir. 1998) (holding that complaints about an appellate counsel's failure to raise certain points of error on appeal did not satisfy the prejudice prong of ***Strickland*** where the alleged trial court errors that formed the bases for those points of error had rendered neither the trial fundamentally unfair nor the conviction or sentence unreliable).

[95] ***See Moawad v. Anderson***, 143 F.3d 942, 946-47 (5th Cir. 1998) (holding that a claim of ineffective assistance on appeal fails if the claim arose from an alleged error at trial that did not itself prejudice the defendant); ***Goodwin v. Johnson***, 132 F.3d at 176 (holding same); and ***Ricaldy v. Procunier,***736 F.2d 203, 206 (5th Cir. 1984) (holding same).

appeal, or even to present all non-frivolous points that could have been raised.[96] "The Constitution does not require appellate counsel to raise every non-frivolous ground that might be pressed on appeal."[97] Appellate counsel is not ineffective solely because of failure to present every ground urged by the defendant.[98] To prevail on a claim of ineffective assistance by appellate counsel, a petitioner must identify with specificity all grounds for relief that he claims should have been included in his appellate brief.[99]

Because a convicted defendant must satisfy *both* prongs of the ***Strickland*** test, a failure to establish either deficient performance or prejudice under that test makes it unnecessary to examine the other prong.[100] Therefore, a

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[96] ***See United States v. Phillips,*** 210 F.3d at 348 (while appellate counsel is not required to raise every non-frivolous issue, solid meritorious arguments based on directly controlling precedent should be discovered and brought to the court's attention); ***United States v. Williamson,*** 183 F.3d 458, 462 (5th Cir. 1999); ***Williams v. Collins,*** 16 F.3d 626, 635 (5th Cir. 1994) (holding that a federal habeas petitioner's claim of ineffective assistance by appellate counsel failed to satisfy the prejudice prong of ***Strickland*** where all of the omitted grounds for relief on appeal raised by the petitioner were without merit); and ***Sharp v. Puckett,*** 930 F.2d 450, 452 (5th Cir. 1991), and ***Wicker v. McCotter,*** 783 F.2d 487, 497 (5th Cir. 1986) (both holding that appellate counsel need not present every possible point of error on appeal).

[97] ***Ellis v. Lynaugh,*** 873 F.2d 830, 840 (5th Cir. 1989).

[98] ***See Id.*** at 840; ***Wicker v. McCotter,*** 783 F.2d at 487; and ***Hamilton v. McCotter,*** 772 F.2d at 182.

[99] ***See Russell v. Lynaugh***, 892 F.2d 1205, 1213 (5th Cir. 1989) (holding that generalized complaints about the quality of an appellate brief do not satisfy the prejudice prong of the ***Strickland*** test).

[100] ***See Strickland v. Washington,*** 466 U.S. at 700; ***Ransom v. Johnson,*** 126 F.3d at 721; ***Green v. Johnson,*** 116 F.3d at 1122;

(Continued on following page)

failure to establish that counsel's performance fell below an objective standard of reasonableness avoids the need to consider the issue of prejudice.[101] It is also unnecessary to consider whether counsel's performance was deficient where there is an insufficient showing of prejudice.[102] Mere conclusory allegations in support of claims of ineffective assistance of counsel are insufficient, as a matter of law, to raise a constitutional issue.[103]

Applying the standards enunciated above the Court reviews each of Harrelson's claims that Sharpe rendered ineffective assistance at trial and on appeal.

United States v. Seyfert, 67 F.3d 544, 547 (5th Cir. 1995); and ***Armstead v. Scott***, 37 F.3d at 210. ***See also Burnett v. Collins***, 982 F.2d 922, 928 (5th Cir. 1993) (holding the defendant bears the burden of proof on *both* prongs of the ***Strickland*** test).

[101] ***See United States v. Hoskins***, 910 F.2d 309, 311 (5th Cir. 1990); and ***Thomas v. Lynaugh***, 812 F.2d 225, 229-30 (5th Cir. 1987).

[102] ***See Black v. Collins***, 962 F.2d at 40[illegible] ***Bates v. Blackburn***, 805 F.2d 569, 578 (5th Cir. 1986) and ***Martin v. McCotter***, 796 F.2d at 821.

[103] ***See Kinnamon v. Scott***, 40 F.3d 731, 735 (5t[illegible] Cir. 1994) (holding a petitioner's speculative complaints of ineffectiv[illegible] assistance by appellate counsel did not warrant federal habeas relief), ***Anderson v. Collins***, 18 F.3d 1208, 1221 (5th Cir. 1994) (holding that, without a specific affirmative showing of precisely what evidence or testimony was rendered unavailable due to a trial counsel's failure to investigate, develop, and present same, i.e., a showing of exactly what the missing evidence or testimony would have been, a court cannot even begin to apply the ***Strickland*** analysis because it is very difficult to determine whether the defendant was prejudiced by any such deficiencies in counsel's performance); ***United States v. Pineda*** 988 F.2d 22, 23 (5th Cir. 1993); ***Koch v. Puckett***, 907 F.2d 524, 530 (5th Cir. 1990); ***Russell v. Lynaugh***, 892 F.2d 1205, 1213 (5th Cir. 1989); ***United States v. Woods***, 870 F.2d 285, 288 n.5 (5th Cir. 1989); and ***Ross v. Estelle***, 694 F.2d 1008, 1011-12 & n.2 (5th Cir. 1983).

a. Ineffective Assistance of Counsel at Trial

(i) Conflict of Interest

Harrelson contends Sharpe rendered ineffective assistance by failing to withdraw, failing to advise, or failing to disclose to Movant that said trial counsel operated under a variety of conflicts of interest. This claim is predicated on Harrelson's false assertion that both Sharpe and Brown represented Harrelson. Having previously found *supra* that Brown never represented Harrelson in any legal capacity nor contributed to Harrelson's defense, this claim is without merit.

(ii) Inadequate Investigation

Harrelson contends Sharpe rendered ineffective assistance by failing to adequately investigate the case against Movant, including failing to adequately investigate: potential alibi evidence, evidence relating to the firearms testimony given by the FBI expert at trial, and evidence relating to the identities of other suspects whom law enforcement agencies investigated.

In order to establish that counsel was rendered ineffective by virtue of a failure to investigate the case against a defendant or to discover and present evidence, a convicted defendant must do more than merely allege a failure to investigate; he must state with specificity what the investigation would have revealed, what evidence would have resulted from that investigation, and how such

would have altered the outcome of the case.[104] The Court finds each of Harrelson's failure to investigate claims to be without merit because each is conclusory in nature and unsubstantiated by any credible evidence before this Court. The alleged claims of ineffective assistance, whether standing alone or cumulatively, do not raise constitutional habeas issues. Harrelson does not state with specificity what any additional investigation would have revealed, what additional evidence would have resulted from such additional investigation, or how same would have altered the outcome of the case.

Insofar as Harrelson claims Sharpe was ineffective for not investigating the Riojas allegations further and for not calling Riojas as a witness to implicate Brown and his associates, these complaints fail to satisfy the prejudice prong of ***Strickland*** because the Court finds Harrelson has wholly failed to identify what Riojas would have testified to, or had Sharpe called Riojas to testify at Harrelson's trial, how his testimony would have altered the outcome of Harrelson's case. Harrelson merely speculates that it could have influenced the jury to believe his alibi defense. Once Riojas was located,[105] in the course of

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[104] ***See Moawad v. Anderson***, 143 F.3d 942, 948 (5th Cir. 1998); ***Anderson v. Collins,*** 18 F.3d 1208, 1221 (5th Cir. 1994); ***Nelson v. Hargett***, 989 F.2d 847, 850 (5th Cir. 1993); ***United States v. Green***, 882 F.2d 999, 1003 (5th Cir. 1989); ***Lockhart v. McCotter,*** 782 F.2d 1275, 1282-83 (5th Cir. 1986); ***Alexander v. McCotter,*** 775 F.2d 595, 603 (5th Cir. 1985); ***Schwander v. Blackburn***, 750 F.2d 494, 499-500 (5th Cir. 1985); and ***Ross v. Estelle,*** 694 F.2d 1008, 1011 (5th Cir. 1983).

[105] The Court notes that during the course of these § 2255 proceedings, it exercised extreme patience with Movant, was generous with its time and resources, and was appropriately lenient regarding the rules

(Continued on following page)

this § 2255 proceedings, this Court went so far as to obtain an attorney for Riojas and Riojas appeared at the scheduled hearing.[106] When it was time for Riojas to take the stand, however, Riojas' counsel informed the Court, that Riojas refused to testify and that he would seek protection under the Fifth Amendment.[107] As noted in footnote 106, *supra,* the Court patiently waited more than four years for Movant to locate Riojas. Yet, when the stage was set for the Court to hear Riojas' much anticipated revelations, Riojas and Movant produced *nothing.* Consequently, by the close of all the evidentiary hearings in these proceedings, this Court was left with little more than the very distinct impression that, at the time of Judge Wood's murder investigation, Riojas, a seasoned criminal, was an opportunist who shrewdly capitalized on his sketchy, if not fabricated, information by bargaining same for favorable concessions from the Government in the federal sentences he was then serving for crimes unrelated to Judge Wood's

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of evidence and procedure. For example, the Court patiently waited while it took Movant more than four years since the filing of his § 2255 motion to locate Riojas and secure his appearance at an evidentiary hearing. Docket entry no. 648, February 2002 Hr'g Tr. Additionally, when Movant alerted the Court that a "newly found" individual possessed valuable information that may exculpate Harrelson, the Court, in the interest of justice, quickly interviewed said witness *in camera. See* Docket entry no. 647. Although, the Court's efforts resulted in proving the "newly found" witness possessed bogus information, the Court remains confident it permitted Movant every opportunity to present his case for post-conviction relief.

[106] Docket entry no. 648, February 2002 Hr'g Tr.

[107] ***Id.*** at 115 & 122-23.

murder.[108] Despite years of briefing, and numerous evidentiary hearings on the subject, however, Harrelson and his present counsel have failed to present this Court with any *credible* evidence showing that any evidence existed at the time of trial to support the Riojas allegations. Moreover, Harrelson has wholly failed to show that Riojas would have been willing to testify at Harrelson's trial had Sharpe called Riojas as a witness.

Upon thorough review of the record and testimony of the FBI's firearms expert, this Court finds Sharpe exhibited professional competence in investigating and cross-examining the FBI's firearms expert. Harrelson has presented no credible evidence that Sharpe's performance in either investigating the ballistics evidence or cross-examining the prosecution's firearms expert fell below an objective standard of reasonableness or prejudiced his case.

Insofar as Harrelson contends Sharpe rendered ineffective assistance by failing to obtain Southwest flight records for the morning of May 29, 1979, in order to disprove the Government's theory that Harrelson had plenty of time to fly to Dallas after shooting Judge Wood, the Court finds this claim fails to satisfy either prong of ***Strickland***. This aspect of Harrelson's ineffective assistance claim is misleading because it is a complaint that Sharpe was ineffective for failing to discover or investigate the *undiscoverable*. The evidence at trial, showed that in

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[108] Based on the testimony before the Court, Riojas obtained leniency on federal sentences he was serving for crimes unrelated to the Wood murder.

1979 per company policy, Southwest Airlines did not maintain a written manifest identifying passengers for their flights.[109] Additionally, per company policy, the oral cassette recording which logged the names of the passengers as they approached the gate was routinely reused or recorded-over either after a flight landed, or within 24 hours after the flight.[110] Harrelson's claim, therefore, is both without merit and unabashedly shameless. Sharpe cannot be faulted for failing to do the impossible. Likewise, Harrelson was not prejudiced by the failure of Sharpe to obtain evidence which did not exist by the time Sharpe was appointed to represent Harrelson.

In conclusion, none of Harrelson's claims of ineffective assistance of counsel regarding Sharpe's alleged failure to investigate, satisfy either prong of ***Strickland***

(iii) Failure to Object

Harrelson contends Sharpe rendered ineffective assistance by failing to object to the admission at trial of, or to request limiting jury instructions concerning, evidence that Harrelson had previously been convicted of murder and had engaged in a sexual relationship with his stepdaughter.[111] A thorough review of the record reveals objections to testimony that Harrelson was a "convicted hit man." Furthermore, the fact that Harrelson admitted that "killing people was [his] long suit" was admissible to

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[109] XL Tr. 103-104.

[110] ***Id.***

[111] These claims were not the subject of the evidentiary hearings because the Court determined it could resolve same from the record.

demonstrate Harrelson's solicited his services as a contract killer and that he had a predilection for contract killings. Additionally, it is the opinion of this Court that Sharpe was not deficient under ***Strickland***, for not objecting thereto because said objections would have been frivolous.

Similarly any testimony that Harrelson had engaged in a sexual relationship with his step-daughter was admissible to show that Teresa Starr, Harrelson's step-daughter, aided Harrelson in obstructing justice, one of the counts with which he was charged. Thus, Sharpe was not deficient under ***Strickland*** for failing to object thereto. Said objections would have been frivolous.

Harrelson also contends his counsel rendered ineffective assistance for failing to object to, or seek to exclude, the admission of hypnotically-induced testimony from four Government witnesses – Chrys Lambros, Mary Wilkinson, Elizabeth English and Wesley Coddington.[112] Even assuming Sharpe rendered deficient representation, the Fifth Circuit Court of Appeals foreclosed proof of the second prong, when it stated: "We are convinced that excluding the testimony of Lambros and Coddington would have had little or no effect on the jury's verdict."[113] A thorough review of the record reveals the same can be said for the testimony of Wilkinson and English, which by the way, Sharpe effectively discredited on cross-examination.

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[112] ***Id.***

[113] ***Harrelson***, 754 F.2d at 1180.

(iv) Failure to Obtain an Investigator and a Continuance

Insofar as Harrelson maintains Sharpe rendered ineffective assistance by failing to obtain adequate resources to properly investigate the case, and failing to obtain a continuance, the Court finds that despite years of briefing Harrelson has failed to demonstrate how these alleged deficiencies, if they are deficiencies, prejudiced him at trial. Moreover, Sharpe's affidavit puts these claims to rest. A thorough review of the record reveals Sharpe competently cross-examined all of the Government's witnesses and presented, in Harrelson's own words "a strong alibi defense." Harrelson's claim fails under ***Strickland.***

b. Ineffective Assistance of Counsel on Appeal

(i) Conflict of Interest

Harrelson maintains Sharpe rendered ineffective assistance of counsel on appeal by failing to disclose to Movant that said counsel labored under a variety of conflicts of interest. As previously found, Sharpe did not labor under any actual conflict of interest at trial or on appeal. As explained above, attorney Brown played no role in Harrelson's trial or appeal, *ergo*, this claim is without merit.

(ii) Failing to Raise Several Potentially Meritorious Issues on Direct Appeal

Harrelson maintains Sharpe rendered ineffective assistance of counsel by: (1) failing to raise several potentially meritorious issues on direct appeal, including complaints regarding the admission of various pieces of

trial testimony, and (2) failing to adequately present Harrelson's contention that his conversations with attorney Joe Chagra were protected by the attorney-client privilege.

The latter claim was firmly rejected by the Fifth Circuit on direct appeal. The Court finds intolerable Harrelson's sly attempt to re-cast the same argument under the guise of ineffective assistance of appellate counsel.

With respect to the former claims, the Court finds them to be wholly conclusory. Harrelson has failed to establish under ***Strickland*** how any of these alleged deficiencies, if they were deficiencies, prejudiced him on appeal. This Court has examined Harrelson's complaints of identifiable points of error which he believes he should have been included in his appellate brief. None of these claims, however, were reasonably likely to have resulted in a favorable appellate ruling for Harrelson.

II. Need for an Evidentiary Hearing

The Court held numerous evidentiary hearings regarding Harrelson's claims of alleged ***Brady*** violations, conflict of interest and ineffective assistance of counsel. To the extent that any issue was not subject to an evidentiary hearing, the Court found that it was an issue that the Court could plainly resolve from the record. Thus, the Court finds no need for further evidentiary hearings.[114]

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[114] ***See United States v. Bartholomew***, 974 F.2d 39, 41 (5th Cir. 1992).

III. Conclusion

For the foregoing reasons,

Movant's motion to vacate, set aside, or correct his sentence pursuant to Title 28 U.S.C. § 2255 (docket entry no. 468) is hereby, in all respects, DENIED.

IT is so ORDERED.

SIGNED this 14 day of March, 2003.

/s/ Orlando L. Garcia
ORLANDO L. GARCIA
UNITED STATES DISTRICT JUDGE